APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, ~~1968~~ ~~1969~~ 1970

No. ~~1079~~ 5315

SARA BAIRD,
Petitioner,

vs.

STATE BAR OF ARIZONA
Respondent.

On Writ of Certiorari to the
Arizona Supreme Court

Petition for Certiorari Filed February 21, 1969
Certiorari Granted April 7, 1969

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GENERAL CHRONOLOGY

December 20, 1968: Petition for Order to Show Cause, and supporting Memorandum of Points and Authorities, were filed with the Arizona Supreme Court.

December 23, 1968: Order to Show Cause was issued by the Arizona Supreme Court to the Committee on Examinations and Admissions.

January 3, 1969: Response of Committee on Examinations and Admissions to Order to Show Cause, and supporting memorandum, were filed with the Arizona Supreme Court.

January 14, 1969: Hearing was held by the Arizona Supreme Court on the Order to Show Cause and Petitioner's Reply Memorandum was filed.

January 14, 1969: The Arizona Supreme Court denied the Petition for Order to Show Cause.

PETITION

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN THE MATTER OF THE APPLICATION OF SARA E. BAIRD FOR ADMISSION TO THE STATE BAR	PETITION FOR ORDER TO SHOW CAUSE

The petition of SARA E. BAIRD respectfully shows as follows:

1. Petitioner is a June, 1967, graduate of the Stanford University Law School and from the time of her graduation to the present has resided continuously in Arizona. In February, 1968, she took the Arizona Bar examination. She is informed and believes, and upon such information and belief alleges, that she passed the examination, but the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona (hereinafter referred to as the "Committee") has refused and still does refuse to recommend petitioner for admission to the State Bar of Arizona.

2. Your petitioner has been informed by the Chairman of the Committee that the reason for the refusal of the Committee to further process her application and to recommend her for admission is that your petitioner answered "Not Applicable" to Question No. 27 of the document known as "Applicant's Questionnaire and Affidavit," the form of which questionnaire and affidavit is set forth in Arizona Supreme Court Rule 28. Question No. 27 reads as follows:

> "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

3. Question No. 27 is in fact "not applicable" to the application of your petitioner because she fully and truthfully answered Ques-

tion No. 25 of the Questionnaire and Affidavit, which question reads as follows:

"List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years."

4. Even if applicable, to require petitioner to answer Question No. 27 as a condition to processing her application for admission to the State Bar of Arizona or as a condition to her admission to the Bar is a violation of petitioner's rights under the Constitution of the State of Arizona and under the Constitution of the United States, particularly the First Amendment, as to freedom of speech and association, the Fifth Amendment, as to self-incrimination, and the Fourteenth Amendment, as to due process of law and equal protection, both separately and as making applicable to state actio nthe First and Fifth Amendments to the United States Constitution.

WHEREFORE, your petitioner prays that this Court make and enter its order requiring the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona to be and appear before this Court at a date and time certain then and there to show cause, if any it may have, why petitioner should not forthwith be recommended for admission to the State Bar or, in the alternative, to show cause why petitioner's application should not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit.

ALLEN & FELS

By /s/ Robert H. Allen

Robert H. Allen

755 First National Bank Building
Phoenix, Arizona 85004

(Verification omitted in printing.)

RESPONSE

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

(Title of case omitted in printing.)

RESPONSE OF COMMITTEE ON EXAMINATIONS AND ADMISSIONS TO ORDER TO SHOW CAUSE

The Committee on Examinations and Admissions of the Supreme Court of the State of Arizona for its response to the Petition for Order to Show Cause and said Order to Show Cause, respectfully shows the Court:

1. Answering Paragraph 1 of said Petition, upon information and belief the Committee admits the allegations thereof, excepting that with respect to the allegation that said petitioner "passed the examination", the Committee respectfully shows the Court that it has followed the practice uniformly of permitting applicants to sit for an examination even though their file is not fully cleared upon the condition that such permission is conditional and dependent upon the final approval by the Committee of the showing made in the application and by the applicant as to fitness of the applicant for the practice of law.

2. Your Committee admits the allegations of Paragraph 2 of said Petition.

3. Answering Paragraph 3, your Committee denies the conclusion therein stated.

4. Answering Paragraph 4, your Committee denies the conclusions therein set forth.

Further responding to said Petition, your Committee respectfully shows the Court that it is constituted pursuant to the provisions of Rule 28 of the Rules of the Supreme Court of the State of Arizona and as such has only the powers, responsibilities and obligations as therein set forth and as are set forth with particularity in Rule 28(c) of the Rules of the Supreme Court of the State of Arizona as amended. Said Rule 28(c) as a part thereof specifically prescribes the form of the Applicant's Questionnaire

and Affidavit which said affidavit, paragraph 27 thereof, specifically requires an answer to the question as set forth in petitioner's Paragraph 2 of her Petition for Order to Show Cause. Your Committee does not believe it has the authority or jurisdiction to do other than require compliance with the rules of this Court unless and until the same are amended, altered or rescinded by this Court.

This response is supported by the Memorandum hereafter appearing responding to the Memorandum of the applicant as attached to her Petition for Order to Show Cause.

Respectfully submitted,
HENRY R. MERCHANT, JR.
DAVID K. WOLFE
WILLIAM E. KIMBLE
GEORGE READ CARLOCK
MARK WILMER
By /s/ Mark Wilmer
Chairman
COMMITTEE ON EXAMINATIONS AND ADMISSIONS
858 Security Building
Phoenix, Arizona 85004

MEMORANDUM IN SUPPORT OF RESPONSE TO PETITION FOR ORDER TO SHOW CAUSE

(Relevant excerpts from the Committee Memorandum are as follows:)

"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to an investigation and interrogation as to whether or not the applicant presently entertains the view that a violent overthrow of the United States Government is something to be

sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." Committee Memorandum at 3.

"I also believe that Mrs. Baird should realize that even though she answered the question that she had at one time been a Communist or had otherwise been associated with organizations not regarded as friendly to the United States Government, this would not necessarily cause us to reject her application. We would undoubtedly want to ask her some questions as to her present beliefs and as to other matters which would bear upon the effect such membership would have on her qualifications to practice law." Committee Memorandum at 1.

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the committee would have no legal basis for refusing to recommend her for admission . . . ." Committee Memorandum at 7-8.

JUDGMENT

SUPREME COURT

State of Arizona

Phoenix

January 20, 1969

In the Matter of the Application of SARA E. BAIRD, for admission to the Arizona State Bar.	No. 9498

The following action was taken by the Supreme Court of the State of Arizona on January 14, 1969, in regard to the above-entitled cause:

"ORDERED: Petition for Order to Show Cause = DENIED."

SYLVIA HAWKINSON, Clerk

By /s/ Lucile Brooks
Assistant Clerk

To Allen & Fels
755 First National Bank Building
Phoenix, Arizona 85004

Mark Wilmer
Committee on Examinations and Admission
Arizona State Bar
858 Security Building
Phoenix, Arizona

Arizona Supreme Court Rule 28(a) provides as follows:

The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made. The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter may be adopted. The court will then consider the recommendations and either grant or deny admission. As amended effective June 19, 1964.

Arizona Supreme Court Rule 28(c) (II) provides as follows:

Except as hereinafter provided in Rule X any person desiring to be admitted to the practice of law in the State of Arizona must file with the Secretary of the Committee on Examinations and Admissions, hereinafter called "Committee," at the office of the State Bar of Arizona, a written application in substantially the following form:

Application for Examination

To the Committee on Examinations and Admissions of the Supreme Court of Arizona:

I, _____, hereby apply for permission to take the examination to be given in the month of _____ (February or July) of the year 19____.

I am _____ years of age.

I am, or at the time of the examination for which this application is made, I will be an actual and bona fide resident of the State of Arizona, and have been or will have been such

resident since the ____ day of _____, 19____, residing at _____ (alone) (with my family consisting of _____). (In case the application is based upon the residence attendance at the College of Law of the University of Arizona or of the College of Law of Arizona State University for the two semesters provided by subdivision 2 of Rule IV, there should be inserted in lieu of the foregoing statement of bona fide residence the facts showing the residence attendance at the College of Law of the University of Arizona or of the College of Law of Arizona State University required by Rule IV. In such cases the applicant's address at the University of Arizona or Arizona State University and his permanent home address should be given.)

I graduated or will graduate from the _____ Law School, at _____, on the ____ day of _____, 19____.

I am mentally and physically able to engage in active and continuous practice of the law. (If not, state extent of disability.) _____

The following are the names and addresses of persons by whom the foregoing statements may be verified:_____ _____.

I have never been charged with or convicted of any felony or of any misdemeanor involving moral turpitude, except the following:_____.

My good moral character will be vouched for by _____ _____, whose occupation is _____, and whose address is _____; by _____, whose occupation is _____, and whose address is _____; and by _____, whose occupation is _____, and whose address is _____.

As a part of this application I (file herewith) (have heretofore filed) my Applicant's Questionnaire and Affidavit.

I agree that I will on the day the examination begins file a further statement on the form to be supplied by the Committee at the time of the notification of the time and place of the giving of the examination of any material changes in or additions to the answers to the Applicant's Questionnaire and Affidavit which have occurred between the date of the filing of

said Applicant's Questionnaire and Affidavit and the date of the examination.

Dated this _____ day of _____, 19____.

_____

Rule 28(c)(V) provides as follows:

Before acting upon any application the Committee will require the applicant to file with the Committee applicant's questionnaire and affidavit, which is set forth in Exhibit A hereto attached. This shall be on the printed form which will be furnished by the Committee. The applicant's questionnaire and affidavit must be accompanied by (1) the fingerprints of the applicant taken in an approved manner and certified by a municipal police department, a sheriff's office, or other recognized authority acceptable to the Committee, and (2) a dull finish photograph of the applicant's head, neck and shoulders, not larger than 4 inches by 4 inches nor smaller than 3 inches by 3 inches, taken within six months prior to filing with the Committee.

All of the documents required to be filed by the applicant (except law school diploma in the case of law school graduates who have graduated immediately prior to the examination to be taken) must be filed and any required registration fee paid not later than the first day of October if the application is for the following February examination and not later than the first day of March if the application is for the following July examination; provided, however, that the Committee may, in its discretion and for good cause shown, entertain and act upon an application, accompanied by said documents and registration fee, if filed within a reasonable time subsequent to the applicable filing date and the Committee finds that its investigation of the fitness of the applicant to practice law is not unreasonably impaired by such late filing.

After said applicant's questionnaire and affidavit, fully answered under oath, is filed, the Committee will make such investigation as it deems proper for the purpose of determining whether or not the applicant possesses the qualifications specified in Rule IV.

Such investigation will ordinarily require not less than ninety (90) days. As a part of such investigation, the applicant himself may be required to appear before the Committee for a personal interview.

When an application has been acted upon by the Committee, the Secretary will promptly notify the applicant whether he has or has not been granted permission to take the desired examination. If such permission is granted, the Secretary will also notify the applicant of the time and place of such examination.

Exhibit A to Arizona Supreme Court Rule 28, the Applicant's Questionnaire and Affidavit, is as follows:

Instructions to the Applicant

All Statements are to be based on your own knowledge, unless the statement is expressly qualified to show the source of your information. Answer all questions and make your answers as specific as possible. If the space for any answer is insufficient, you may complete your answer on a separate attached sheet. Please have the answers typewritten if possible.

Applicant's Questionnaire and Affidavit

1. State:
   (a) Full name.
   Social Security Number:
   (b) Have you ever been known by any other name or surname _____; if so state all names
   Yes or No
   used and the places and times thereof.
   If married woman, give maiden name.
   _____
2. Date of birth_____
   Birthplace _____ Age _____
3. State every residence you have had since you were sixteen years of age:

City and State	Street No.	From (Mo. & Yr.)	To (Mo. & Yr.)

4. My education was received as follows:

(a) High School _____
Name, Location

Dates of attendance:
From _____ To _____

(b) College or University other than law study

_____
Name Location

Dates of attendance:
From _____ To _____
(If you did not attend a college, so state)

_____

(c) Law Study:
Law Schools _____
Name, Location

Dates of attendance:
From _____ To _____

_____
Name Location

Dates of attendance:
From _____ To _____
Degrees: _____
Yes or No What Degrees

Law Office Study:

_____
Name of firm or employer Address
Dates: From_____ To _____

_____
Name of firm or employer Address
Dates: From_____ To_____

5. Make a complete statement of your practice of the law since first being admitted to practice in any jurisdiction. Include temporary or part-time work. State as to each employment or period of private practice:

(1) The periods during which you were employed as an attorney, or engaged in private practice, with the dates.

(2) The exact addresses of the offices or places at which you were so employed or engaged and the complete names and present addresses of all such former

employers, partners or associates, if any. (If room number of office is known, this should be given. If you shared office space with other lawyers or business firms, please so state and give their full names and present addresses.)

(3) The nature and extent of your duties or practice.

(4) The reason for the termination of each employment or period of private practice.

(1) (2) (3) (4)

6. Make a complete statement of all employments you have had, or business or occupations in which you have been engaged on your own account, since you became sixteen years of age, other than as set forth in question 5. Include temporary or part-time work. State as to each employment, business, or other occupation:

(1) The periods during which you were so employed or engaged with the dates.

(2) The exact addresses of the offices or places at which you were so employed or engaged and the names and present addresses of all such former employers, partners or associates in business, if any.

(3) The position held by you.

(4) The reason for the termination of each employment, business or other occupation.

(1) (2) (3) (4)

Include complete details regarding any service in the armed forces, i.e., dates of service, rank, serial number, locations, last commanding officer, and your last service address complete. If separated from such service, state nature of such separation and, if other than honorable, specify type thereof and circumstances surrounding your release. Give full particulars as to any complaints or disciplinary proceedings against you.

7. Have you ever held any judicial office?

yes or no

If so, state where, when, and offices held, and if terminated the reasons therefor: _____

8. (a) Have you ever held a license, other than as an attorney at law, the procurement of which required proof of good character (i.e., certified public accountant, patent attorney, real estate broker, etc.) _____

Yes or No

As to each license, state the date it was granted, and the name and address of the authority issuing it.

_____

(b) State every application presented and examination taken by you for a license granted by the state or an official position, the procurement of which required proof of good character. (Specify all examinations whether or not you were successful. Specify every application presented including applications for reinstatement and withdrawn applications and whether or not they were granted.) State as to each application the date, the name and address of the authority to whom it was addressed, and the disposition made of it, with the reasons therefor, and as to each examination the result thereof.

_____

9. Name all jurisdictions and courts in which you have been admitted to practice law. Give dates of admission to practice.
(a) Jurisdiction (b) Courts (c) Date of Admission

_____

10. State every application for admission to the bar made by you EXCEPT those covered by your answers to question 9, the disposition made of each such application, and the reasons therefor.

_____

11. Have you registered or taken any other steps looking to taking the examination in any other jurisdiction?

_____

Yes or No

If so, give dates and full circumstances_____

_____

12. Do you intend to take the examination or apply for admission in any other jurisdiction between the date hereof and

your admission to the Bar of Arizona, if you qualify?

_____

Yes or No

If so, gives [sic] dates and full circumstances_____

_____

13. Have you been entitled to practice in each of the locations specified under question 9 and before each court continuously from the date you first became so entitled until the date hereof? _____

Yes or No

If not, state the dates during which you have not been so entitled, the nature of the disqualification, the facts, and the name and address of the person or body in possession of the record thereof.

_____

14. Have you been disbarred, suspended from practice, reprimanded, censured or otherwise disciplined or disqualified as an attorney or member of any profession or organization, or holder of any office, public or private; or have any complaints or charges, formal or informal, ever been made or filed or proceedings instituted against you?_____

Yes or No

If so, state the dates, the facts, the disposition of the matter, and the name and address of the authority in possession of the record thereof. _____

15. If you have been previously admitted to the bar, state the exact names and addresses of courts before which your former practice of law was chiefly conducted.

_____

Name Location

16. Have you ever held a bonded position?_____

Yes or No

If so, specify nature of position, dates, amount of bond and whether or not any one ever sought to recover upon your bond or to cancel the same. State facts fully, including the name and address of the bonding company, if any.

_____

17. Were you ever dropped, suspended, or expelled from school or college? _____

Yes or No

If so, state facts fully.

_____

18. Were you at any time in the course of your schooling or elsewhere accused of cheating or plagiarism?_____
Yes or No

Give details. _____

19. (a) Have you ever been a party to or had or claimed any interest in any civil proceeding?_____
Yes or No

(b) Have you ever been charged with, arrested, or questioned regarding, the violation of any law?_____

_____
Yes or No

(c) Have you ever been charged with fraud, formally or informally, in any legal proceeding, civil or criminal, or in bankruptcy?_____
Yes or No

(d) Have you ever been declared a ward of any court?

_____
Yes or No

(e) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court?

_____
Yes or No

(f) Have you ever been adjudicated a bankrupt, or has a petition in bankruptcy been filed at any time by you or against you, either alone or in association with others? Have you ever been brought in as a party to any proceedings in a bankruptcy court; or have you ever been sued or threatened with suit by the receiver, trustee, or other authority of any bankrupt estate, for unlawful preference, conspiracy to conceal assets, or any other fraud or offense, whether punishable by criminal law or not?_____
Yes or No

Give full details for (a), (b), (c), (d), (e), and (f), including dates, exact name and address of the court if any, case numbers, references to the court records if any, the facts, the disposition of the matter; if no court records are available, give to the best of

your ability the names and addresses of all persons involved, including counsel. (Include all such incidents no matter how minor the infraction or whether guilty or not.)

20. Are there any unsatisfied judgments against you?

Yes or No

If so, list them, giving names and addresses of creditors, amounts, dates and nature of judgment, and reasons for nonpayment.

21. (a) State whether or not you are married _____

Yes or No

If so, give date of each marriage and full name of spouse prior to that marriage.

(b) State whether or not you have ever been divorced.

Yes or No

If so, the name of the spouse from whom divorced, the exact name and address of the court, the case number, the date, the ground of divorce, and by whom suit was brought.

(c) If a divorce suit is pending or a marriage has been annulled, give particulars similar to those requested under (b).

22. State names and addresses of three persons in each locality where you practiced law with whom you are personally acquainted, preferably other than those referred to in your answer to question 5. (If you have not practiced previously, give the same information for each locality in which you have lived.)

Name Address Occupation How long has known you

23. Give the names and addresses of three attorneys and two clients who know you. These should be other than those supporting your application or named in questions 5 and

22. (If you have not practiced previously, give the names of law school professors, etc.)

Name Address Occupation

---

24. Give the name and location of each bar association of which you are or have ever been a member.
25. List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.

---

26. Is there any other incident in your career, not hereinbefore referred to, having a bearing upon your character or fitness for admission to the Bar? _____

Yes or No

If so, give full details.

27. Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?

I, _____, hereby apply for a character report in connection with my application for admission to practice law in the State of Arizona. I agree to give any further information which may be required in connection with my past record, and consent to having this investigation made and such information as may be received reported to the admitting authority.

I agree that I will not receive a copy of the report, or any information received in connection with this application, and I expressly waive any and all rights I might have or claim to such report, any copy thereof, or to know the contents thereof.

_____

Signature

STATE OF _____)
COUNTY OF_____) ss.

_____, being duly sworn, says: I have read the foregoing questions and have answered them fully and frankly. The answers are complete and are true of my own knowledge.

_____

Signature of Applicant

Subscribed and sworn to before me this _____ day of _____, A.D. 19____.

_____

Notary Public

Supreme Court of the United States

No. 1079 -----, *October Term, 19* 68

Sara Baird,

Petitioner,

v.

State Bar of Arizona

Order allowing certiorari. *Filed* April 7 -----, *19* 69.

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona *is granted,* **and the case is placed on the summary calendar.**

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 315

SARA BAIRD, *Petitioner,*

v.

STATE BAR OF ARIZONA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

ROBERT H. ALLEN
755 First National
Bank Building
Phoenix, Arizona

JOHN P. FRANK
PETER D. BAIRD
LEVI J. SMITH
114 West Adams Street
Phoenix, Arizona

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

SARA BAIRD, *Petitioner*,

v.

STATE BAR OF ARIZONA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

Sara Baird petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court entered in this case on January 14, 1969.

Opinion Below

The judgment of the Arizona Supreme Court is unreported and is without opinion. The Arizona Supreme Court's judgment is evidenced by an order entered in the record denying Sara Baird's petition for admission to the State Bar of Arizona. Appendix A, *infra* at 1a.

Jurisdiction

The judgment of the Arizona Supreme Court was entered on January 14, 1969. Appendix A, *infra* at 1a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). This Court has jurisdiction to review exclusions from bar associations when federal questions are involved. *E.g., Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

Question Presented

May a fully qualified applicant for admission to the bar, who has identified all organizations with which she has been affiliated since becoming 16, be excluded from the practice of law solely because she refuses to answer the further question, "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?," particularly when the express purpose for that question is to inquire into her beliefs and views? The applicant's refusal to answer this question is based upon the guarantee of freedom of speech and of association under the First Amendment of the United States Constitution, the self-incrimination clause of the Fifth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment of the United States Constitution, and the due process clause of the Fourteenth Amendment of the United States Constitution.

Constitutional Provisions, Statutes and Rules Involved

The relevant portions of the First Amendment, the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, ARIZ. REV. STAT. ANN. § 13-561, ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969), and ARIZ. S. CT. R. 28(c) (Supp. 1969) are set forth in Appendix B, *infra* at 2a-3a.

Statement of the Case

Petitioner, Sara Baird, graduated from Stanford University Law School in June, 1967. In February, 1968 she took the Arizona Bar examination, which she passed.* Subsequently, the State Bar Committee on Examinations and Admissions (hereinafter referred to as the "Committee"), refused to process her application further and to recommend her for admission to the Arizona State Bar Association.

The Committee's position was based solely upon the fact that petitioner declined to answer question 27 of the document known as "Applicant's Questionnaire and Affidavit," which is set forth in Arizona Supreme Court Rule 28(c) (Supp. 1969). *See* Appendix B, *infra* at 3a; Committee Response ¶2, Appendix C, *infra* at 7a. Question 27 reads as follows: "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

On the same "Questionnaire and Affidavit" petitioner did respond to and comply with question 25, which reads as follows: "List all organizations, associations, and club [*sic*] (other than Bar associations) of which you are or have been a member since attaining the age of sixteen years." Appendix B, *infra* at 3a.

The Committee's express purpose in requiring an an-

* The State Bar Committee on Examinations and Admissions has admitted that the only reason for its refusal to recommend her for membership in the bar is her failure to answer the question, the constitutionality of which is challenged by this petition (Petition ¶1, ¶2, Committee Response ¶2, Appendix C, *infra* at 4a-5a and 7a), and its acknowledgment that if she answered the question to the Committee's satisfaction, the Committee would have no legal basis upon which to exclude her from the practice of law. Committee Memorandum at 8, Appendix C, *infra* at 9a-10a.

swer to question 27 was not to discover petitioner's past or present conduct but rather to assure the Committee that petitioner does not adhere to an unorthodox political belief. The purpose behind question 27 is made clear by the Committee's Memorandum, which was filed with the court below and which contains the following excerpts:

"Unless we are to conclude that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to an *investigation and interrogation* as to *whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. *If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission.*" Committee Memorandum at 3, Appendix C, *infra* at 9a (emphasis supplied).

"I also believe that Mrs. Baird should realize that even though she answered the question that she had at one time been a Communist or had otherwise been associated with organizations not regarded as friendly to the United States Government, this would not necessarily cause us to reject her application. *We would undoubtedly want to ask her some questions as to her present beliefs* and as to other matters which would bear upon the effect such membership would have on her qualifications to practice law." *Id.* at 1, Appendix C, *infra* at 9a (emphasis supplied).

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' *the committee will then endeavor to ascertain if Sara Baird does adhere to the view* that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that

she *would expect* to actively support such views. *If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona.* Should the conclusion be that her membership is of a nominal character and that she does not *participate and adhere to the views* that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission. . . ." *Id.* at 7-8, Appendix C, *infra* at 9a-10a (emphasis supplied).

Under the review procedure outlined in Arizona Supreme Court Rule 28(c) (Supp. 1969), petitioner filed a verified petition and a memorandum of points and authorities with the Arizona Supreme Court on December 20, 1968. This petition reads in part as follows:

". . . to require petitioner to answer Question No. 27 as a condition to processing her application for admission to the State Bar of Arizona or as a condition to admission to the Bar is a violation of petitioner's rights under the Constitution of the State of Arizona and under the Constitution of the United States, particularly the First Amendment, as to freedom of speech and association, the Fifth Amendment, as to self-incrimination, and the Fourteenth Amendment, as to due process of law and equal protection, both separately and as making applicable to state action the First and Fifth Amendments to the United States Constitution." Petition ¶4, Appendix C, *infra* at 5a.

Thereafter, an order to show cause was issued, directing the Committee to show cause ". . . why petitioner's application should not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit." Order to Show Cause at 1. Subsequently, the Committee filed its response, together with a memorandum of points and authorities, admitting that the refusal to

answer question 27 was the reason for not processing her application or for recommending her for membership in the Bar Association, and denying that petitioner's constitutional rights were infringed by making an answer to question 27 prerequisite for permission to practice law in Arizona. *See generally* Committee Response, Appendix C, *infra* at 7a-8a.

On January 14, 1969, oral argument was presented to the Arizona Supreme Court. Subsequently, the Arizona Supreme Court entered, without opinion, a denial of Sara Baird's petition. The issue in the petition was whether constitutional rights had been denied; and no state ground, adequate or otherwise, was raised by the Committee. *Cf. Konigsberg v. State Bar*, 353 U.S. 252, 257 (1957). It is ". . . presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Klinger v. Missouri*, 13 Wall. 257, 263 (1871; *See* STERN AND GRESSMAN, SUPREME COURT PRACTICE § 3-32 at 108-09 (3rd ed. 1962).

Reasons for Granting the Writ

Sara Baird is a young woman who has met all of the requirements for admission to the State Bar of Arizona. However, she declines to answer question 27, which requires her to tell the Committee whether she has ever been ". . . a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." According to the Arizona Supreme Court, she can be kept from practicing law for this refusal.

Question 27 orders petitioner to go beyond question 25, which required her to list all organizations with which she has been associated since the age of 16. Ques-

tion 27 requires her to make a judgment, under penalty of perjury, whether any group to which she belongs or has belonged is the Communist Party or is an organization which advocates the overthrow of the United States Government by force or violence. ARIZ. REV. STAT. ANN. § 13-561 (Arizona perjury statute), Appendix B, *infra* at 2a.

The Committee's purpose for requiring an answer to question 27 is not to gather information about petitioner's associations because she has already listed these in response to question 25. Furthermore, question 27 is not used to ascertain whether petitioner has engaged in illegal conduct. Instead, the Committee's purpose in requiring an answer to question 27 is to determine whether petitioner subscribes to unorthodox "beliefs" or "views."

As stated by the Committee, if ". . . the applicant *presently entertains the view* that a violent overthrow of the United States Government is something to be sought after . . . *then indeed we would reject the application and recommend against admission.*" Committee Memorandum at 3, Appendix C, *infra* at 9a (emphasis supplied). In fact, the premise upon which an answer to question 27 is deemed "appropriate" by the Committee is that belief alone can disqualify one from practicing law: "*Unless we are to conclude* that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, *then* an answer to this question is indeed appropriate." *Id.* (emphasis supplied).

A. *The Decision Below Conflicts with Applicable Decisions of This Court.*

1. The decision below conflicts with *Schneider v. Smith*, 390 U.S. 17 (1968), insofar as it is grounded on

the First Amendment. This Court held in *Schneider* that a person who applied for a license to act as a second assistant engineer on merchant vessels and who disclosed some of his memberships could decline to answer additional interrogatories requesting the names and details of his "political and social organizations," his "attitude" toward various organizations and principles, and his activities and subscriptions with the "People's World." *Id.* at 20 n.2.

One of *Schneider's* basic points was that the First Amendment ". . . *creates a preserve where the views of the individual are made inviolate.*" *Id.* at 25 (emphasis supplied).* In the present case, the Committee's express rationale for question 27 is to inquire into "beliefs" and "views." Committee Memorandum at 1, 8, Appendix C, *infra* at 9a-10a. In terms of disclosing names of organizations to which she has been associated, petitioner has divulged as much as Schneider. Whereas Schneider refused to answer the specific interrogatories about his associations, petitioner declines to characterize any of her listed organizations as the Communist Party or as an organization that advocates overthrow of the Government by force or violence. If the Commandant of the Coast Guard in *Schneider* was not justified in refusing ". . . to process the application further . . . ," then the Committee cannot be justified in refusing to process petitioner's application further. *Id.* at 21, 25; *see Shelton v. Tucker*, 364 U.S. 479 (1960).

2. The decision of the Arizona Supreme Court below

* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

also conflicts with the result reached in *Spevack v. Klein*, 385 U.S. 511 (1967). This Court in *Spevack* held that a lawyer who claimed the Fifth Amendment privilege could not be disbarred for refusing to honor a subpoena duces tecum and for declining to answer questions posed by a bar committee. Therefore, under *Spevack*, a lawyer may *not* be disbarred for refusing to answer a question on the grounds of a Fifth Amendment privilege. By the decision below, an applicant for admission to practice law *may* be excluded for claiming a First Amendment and a Fifth Amendment right to refuse to answer a question. The personal effect of the refusal is the same in both cases, and the result must also be the same. Denial to an applicant of the right to practice law and disbarment of a lawyer have been recognized as being essentially the same thing. *Id.* at 521 (dissent) (". . . I can perceive no distinction between 'admission' and 'disbarment' in the rationale of what is now held."); *Cohen v. Hurley*, 366 U.S. 117, 123 (1961).

An absurdity is created by the coexistence of *Spevack* with the decision below. The lawyer who claims self-incrimination may refuse to answer a question on that ground and will nonetheless remain a member of the bar. The applicant who declines to answer a question because of both First Amendment and Fifth Amendment rights will be excluded from the bar. For example, a member of the Arizona Bar who is also a member of the Communist Party could claim a Fifth Amendment right to remain silent and, under *Spevack v. Klein*, *supra*, would retain the right to practice law. *See* ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969) ("A person who knowingly or wilfully becomes or remains a member of the Communist Party . . . is guilty of sedition against the state."), Appendix B, *infra* at 2a-3a. On the other hand, a

person who applies for membership in the state bar but who refuses to pass judgment on the quality of her associations on both First and Fifth Amendment grounds will be denied the right to practice law. This paradox warrants solution.

3. The decision below also clashes with the due process principle of *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), wherein this Court stated that any qualification for the practice of law ". . . must have a rational connection with the applicant's fitness or capacity to practice law." Since petitioner complied with question 25, the practical effect of the decision below is to deny petitioner the right to practice law when the only undisclosed affiliations were those "subversive" associations which petitioner might have had before she was sixteen years old. A qualification which requires an answer to question 27, for the purpose of learning about petitioner's possible pre-adolescent subversive associations, cannot have a "rational connection" with petitioner's fitness to practice law. Moreover, a requirement that petitioner characterize her organizations as the Communist Party or as advocating the overthrow of the government by force or violence also has no rational connection with petitioner's fitness to practice law.

4. The foregoing conflicts created by the decision below are not resolved by the invocation of either *Konigsberg v. State Bar of California*, 366 U.S. 36, 45 (1961), or *In re Anastaplo*, 366 U.S. 82, 88 (1961). Even though both *Konigsberg* and *Anastaplo* held that an applicant who refused to answer certain questions could be denied the right to practice law on the ground that his refusal to answer has obstructed a full investigation into his qualifications, this holding cannot rescue the decision below for two basic reasons:

First, "obstruction" was the result of specific findings of fact entered into the record in both *Konigsberg* and *Anastaplo*. In light of *Wood v. Georgia*, 370 U.S. 375, 386-89 (1962), it is probable that today a curtailment of a First Amendment freedom, like association, would need an even more specific finding of fact than in *Konigsberg* or *Anastaplo*. In the present case, there was no finding of fact establishing "obstruction."

Secondly, it is doubtful that "obstruction" in any valid sense could be found in the present case and therefore that the interest of the Committee could "outweigh" that of petitioner. In *Konigsberg*, obstruction was grounded upon ". . . refusals to answer *any* questions relating to his [possible] membership in the Communist Party." *Konigsberg v. State Bar of California, supra* at 39 (emphasis supplied). In *Anastaplo*, obstruction was based upon broad-ranging refusals to answer questions about church memberships, political memberships, political loyalties and religious beliefs. *In re Anastaplo, supra* at 85, 86 & n.5.

Comparatively speaking, petitioner has furnished more information about her associations than did either Konigsberg or Anastaplo. She has listed all of the organizations, associations and clubs to which she has belonged during the 10 years since becoming 16 years old. Therefore, in terms of what has been requested and what has been refused, it is impossible to rationally establish a basis for finding obstruction in the present case. Even if the method is still to "weigh" the respective interests involved, the scales must surely tilt in favor of petitioner.

B. *The Issue Is Important.*

Question 27, which petitioner refuses to answer, constitutes a double deterrent to freedom of association. First, one must take care not to join an organization

which might have unorthodox precepts because such membership would become the subject of specific and protracted inquiry when one seeks to become a lawyer in Arizona. This inquiry would delve into the applicant's views and beliefs rather than misconduct or violation of the law. For, according to the Committee, a "yes" answer to question 27

> "*would lead to an investigation and interrogation as to whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." Committee Memorandum at 3, Appendix C, *infra* at 9a (emphasis supplied).

Secondly, after joining an organization one must be constantly on guard to ascertain whether it is really the Communist Party in disguise and what the organization collectively advocates. This is required because the Committee is not interested only in the names of the organizations to which an applicant belongs, for a response to question 25 is insufficient. Instead, the applicant must go the additional step, tell the Committee whether any of the organizations listed in response to question 25 is the Communist Party, and explain whether any of these organizations advocates the overthrow of the government by force or violence.

Question 27, with its resulting impact upon freedom of association, is imposed upon all applicants for admission to the Arizona State Bar. And the problem is not restricted to Arizona. In Nevada, an applicant to practice law must state under oath "[w]hether or not the applicant is, or ever has been, a member of the Communist Party, or of any organization devoted to, or advocating support

of, communism, giving full particulars." 1 NEV. REV. STAT., S. CT. R. 52(2)(k). The sanction for not answering is clear: ". . . failure to set out information required on the forms, shall be sufficient cause for denial of admission." *Id.* 52(5); *Cf.* 3A WEST. CAL. BUS. & PROF. § 6068 R. V § 53, R. VII § 71 (Supp. 1968-69). Now pending before a three-judge panel is *Law Students Civil Rights Research Council v. Wadmond*, 291 F. Supp. 772, 775 (S. D. N. Y. 1968), where inquiries similar to Arizona's question 27 are claimed to ". . . have the effect of deterring and inhibiting the exercise of rights of speech, association and belief guaranteed by the First Amendment."

The necessity for reviewing petitioner's case is emphasized by the fact that, since 1961 when *Konigsberg* and *Anastaplo* were decided, First Amendment protections have been broadened considerably in other employments and contexts. This is true, for example, in the area of compulsory disclosure. *E.g., Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) (". . . compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association. . . ."). The same is true where federal employment is conditioned upon associational disclosure. *E.g., Soltar v. Postmaster General*, 277 F. Supp. 579, 580 (N.D. Cal. 1967) ("This Court is of the opinion that requiring plaintiff [*i.e.*, an applicant for a postoffice job] to answer questions 7 and 8 [which inquired into Communist Party membership] clearly violates his First Amendment rights."); *see also Schneider v. Smith, supra.*

A similar application of the First Amendment is evident where government workers are subject to prosecution for their associations (*e.g., United States v. Robel,*

389 U.S. 258, 265 (1967): "The inhibiting effect on the exercise of First Amendment rights is clear."), and where federal health insurance benefits are dependent upon an organizational disclaimer. *E.g., Reed v. Gardner*, 261 F. Supp. 87, 92 (C.D.Cal. 1966) (". . . Section 103(b)(1) of the Act and the use of the subject question or disclaimer are unconstitutional as violative of the First Amendment. . . ."). The First Amendment has been strengthened also in judging loyalty oaths (*e.g., Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966), where this Court said that the Arizona Act requiring the loyalty oath threatened ". . . the cherished freedom of association protected by the First Amendment. . . ."), and in assessing the requisite state interest permitting intrusion into First Amendment freedoms. *E.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) (". . . only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); *Gibson v. Florida Legislative Investigation Committee, supra* at 546 (". . . overriding and compelling state interests.").

Lawyers should not be denied the same degree of First Amendment protection accorded to seamen, defense workers, teachers, post office clerks and federal health insurance claimants. The decision below conflicts with *Schneider v. Smith, supra, Spevack v. Klein, supra*, and *Schware v. Board of Bar Examiners, supra*, and the conflicts should be confronted. Even *Konigsberg* and *Anastaplo* do not permit the kind of unmeditated and unfounded conclusion of "obstruction" which might be urged in support of the decision below. Sara Baird should not be forced to answer question 27 as a prerequisite to becoming a lawyer.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert H. Allen
John P. Frank
Peter D. Baird
Levi J. Smith

Counsel for petitioner.

February, 1969.

APPENDIX A

SUPREME COURT

State of Arizona

Phoenix

January 20, 1969

In the Matter of the Application of SARA E. BAIRD, for admission to the Arizona State Bar	No. 9498

The following action was taken by the Supreme Court of the State of Arizona on January 14, 1969, in regard to the above-entitled cause:

"ORDERED: Petition for Order to Show Cause = DENIED."

SYLVIA HAWKINSON, Clerk

By /s/ Lucile Brooks

Assistant Clerk

To Allen & Fels
755 First National Bank Building
Phoenix, Arizona 85004

Mark Wilmer
Committee on Examinations and Admission
Arizona State Bar
858 Security Building
Phoenix, Arizona

APPENDIX B

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peacably to assemble. . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARIZ. REV. STAT. ANN. § 13-561 provides in pertinent part:

> "A person who, in a trial, hearing, investigation, deposition, certification or declaration, in which making or subscribing a statement is required or authorized by law, makes or subscribes a material statement under oath, affirmation or other legally binding assertion that the statement is true, when in fact the witness or declarant does not believe that the statement is true or knows that it is not true, or intends thereby to avoid or obstruct the ascertainment of the truth, is guilty of perjury."

ARIZ. REV. STAT. ANN. § 13-707(C)(Supp. 1969) provides in pertinent part:

> "C. A person who knowingly or wilfully becomes or remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona, or

any of its political subdivisions, and said person has knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state."

ARIZ. S. CT. R. 28(c) (Supp. 1969) provides in pertinent part:

"25. List all organizations, associations and club [*sic*] (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.

"27. Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?

"STATE OF .....
COUNTY OF ..... } ss.

....., being duly sworn, says: I have read the foregoing questions and have answered them fully and frankly. The answers are complete and are true of my own knowledge.

.....
Signature of Applicant

Subscribed and sworn to before me this .....

day of ....., A.D. 19.....

.....
Notary Public"

APPENDIX C

PETITION

The petition for order to show cause which was filed with the Arizona Supreme Court provides as follows:

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN THE MATTER OF THE APPLICATION OF SARA E. BAIRD FOR ADMISSION TO THE STATE BAR	PETITION FOR ORDER TO SHOW CAUSE

The petition of SARA E. BAIRD respectfully shows as follows:

1. Petitioner is a June, 1967, graduate of the Stanford University Law School and from the time of her graduation to the present has resided continuously in Arizona. In February, 1968, she took the Arizona Bar examination. She is informed and believes, and upon such information and belief alleges, that she passed the examination, but the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona (hereinafter referred to as the "Committee") has refused and still does refuse to recommend petitioner for admission to the State Bar of Arizona.

2. Your petitioner has been informed by the Chairman of the Committee that the reason for the refusal of the Committee to further process her application and to recommend her for admission is that your petitioner

answered "Not Applicable" to Question No. 27 of the document known as "Applicant's Questionnaire and Affidavit," the form of which questionnaire and affidavit is set forth in Arizona Supreme Court Rule 28. Question No. 27 reads as follows:

> "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

3. Question No. 27 is in fact "not applicable" to the application of your petitioner because she fully and truthfully answered Question No. 25 of the Questionnaire and Affidavit, which question reads as follows:

> "List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years."

4. Even if applicable, to require petitioner to answer Question No. 27 as a condition to processing her application for admission to the State Bar of Arizona or as a condition to her admission to the Bar is a violation of petitioner's rights under the Constitution of the State of Arizona and under the Constitution of the United States, particularly the First Amendment, as to freedom of speech and association, the Fifth Amendment, as to self-incrimination, and the Fourteenth Amendment, as to due process of law and equal protection, both separately and as making applicable to state action the First and Fifth Amendments to the United States Constitution.

WHEREFORE, your petitioner prays that this Court make and enter its order requiring the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona to be and appear before this Court at a date and time certain then and there to show cause, if any it may have, why petitioner should not forthwith

be recommended for admission to the State Bar or, in the alternative, to show cause why petitioner's application should not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit.

ALLEN & FELS

By /s/ Robert H. Allen

Robert H. Allen

755 First National Bank Building

Phoenix, Arizona 85004

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

SARA E. BAIRD, being first duly sworn, deposes and says:

That she is the petitioner in the foregoing Petition; that she has read the foregoing Petition, knows the contents thereof, and that the same is true of her own knowledge, except for those matters therein alleged upon information and belief, and as to such matters, she believes the same to be true.

/s/ Sara E. Baird

SARA E. BAIRD

Subscribed and sworn to before me this 29 day of November, 1968.

/s/ John L. Hay

Notary Public.

My commission expires:
July 7, 1970

RESPONSE

The response of Committee on Examinations and Admissions to Order to Show Cause which was filed with the court below is as follows:

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF THE APPLICATION OF SARA E. BAIRD FOR ADMISSION TO THE STATE BAR } No. 9493

RESPONSE OF COMMITTEE ON EXAMINATIONS AND ADMISSIONS TO ORDER TO SHOW CAUSE

The Committee on Examinations and Admissions of the Supreme Court of the State of Arizona for its response to the Petition for Order to Show Cause and said Order to Show Cause, respectfully shows the Court:

1. Answering Paragraph 1 of said Petition, upon information and belief the Committee admits the allegations thereof, excepting that with respect to the allegation that said petitioner "passed the examination", the Committee respectfully shows the Court that it has followed the practice uniformly of permitting applicants to sit for an examination even though their file is not fully cleared upon the condition that such permission is conditional and dependent upon the final approval by the Committee of the showing made in the application and by the applicant as to fitness of the applicant for the practice of law.

2. Your Committee admits the allegations of Paragraph 2 of said Petition.

3. Answering Paragraph 3, your Committee denies the conclusion therein stated.

4. Answering Paragraph 4, your Committee denies the conclusions therein set forth.

Further responding to said Petition, your Committee respectfully shows the Court that it is constituted pursuant to the provisions of Rule 28 of the Rules of the Supreme Court of the State of Arizona and as such has only the powers, responsibilities and obligations as therein set forth and as are set forth with particularity in Rule 28(c) of the Rules of the Supreme Court of the State of Arizona as amended. Said Rule 28(c) as a part thereof specifically prescribes the form of the Applicant's Questionnaire and Affidavit which said affidavit, paragraph 27 thereof, specifically requires an answer to the question as set forth in petitioner's Paragraph 2 of her Petition for Order to Show Cause. Your Committee does not believe it has the authority or jurisdiction to do other than require compliance with the rules of this Court unless and until the same are amended, altered or rescinded by this Court.

This response is supported by the Memorandum hereafter appearing responding to the Memorandum of the applicant as attached to her Petition for Order to Show Cause.

Respectfully submitted,
HENRY R. MERCHANT, JR.
DAVID K. WOLFE
WILLIAM E. KIMBLE
GEORGE READ CARLOCK
MARK WILMER
By /s/ Mark Wilmer
Chairman

COMMITTEE ON EXAMINATIONS AND ADMISSIONS
858 Security Building
Phoenix, Arizona 85004

COMMITTEE MEMORANDUM

Relevant excerpts from the Committee Memorandum which was filed with the Court below are as follows:

"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to an investigation and interrogation as to whether or not the applicant presently entertains the view that a violent overthrow of the United States Government is something to be sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." Committee Memorandum at 3.

"I also believe that Mrs. Baird should realize that even though she answered the question that she had at one time been a Communist or had otherwise been associated with organizations not regarded as friendly to the United States Government, this would not necessarily cause us to reject her application. We would undoubtedly want to ask her some questions as to her present beliefs and as to other matters which would bear upon the effect such membership would have on her qualifications to practice law." Committee Memorandum at 1.

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the

Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the committee would have no legal basis for refusing to recommend her for admission . . . ." Committee Memorandum at 7-8.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1079~~ ~~53~~ 15

SARA BAIRD, *Petitioner*,

v.

STATE BAR OF ARIZONA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

MARK WILMER

400 Security Building
Phoenix, Arizona 85004

Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1079

SARA BAIRD, *Petitioner*,

v.

STATE BAR OF ARIZONA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Jurisdiction

The State Bar of Arizona is not a proper party to this Petition. Its only function is to recommend rules governing admission of applicants to the Arizona State Bar and to recommend to the Supreme Court the names of members of the State Bar for appointment to the Committee on Examinations and Admissions, as vacancies occur. The Supreme Court names the members of the Committee and itself promulgates the rules which guide the Committee in its functioning as an arm of the Court. See Rule 28(a), Appendix A.

"The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to

the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court. Arizona Revised Statutes Sec. 32-237, sub-sec. 2(1956) Rule 28 of the Rules of the Supreme Court of Arizona, 17 A.R.S. governs the admission of attorneys to practice."

H. Samuel Hackin v. Lorna E. Lockwood, Jesse A. Udall, Charles C. Bernstein, Fred C. Struckmeyer, Jr., Ernest W. McFarland, Justices of the Supreme Court and the State Bar of Arizona, 361 F.2d 499 (1966) C.A. 9

Question Presented

May an applicant for a license to practice law from the Arizona Supreme Court refuse to answer a question as to whether or not such applicant is a member of any organization which advocates overthrow of the United States Government by force and violence when it is made plain to such applicant by the Supreme Court Committee on Examinations and Admissions that:

(a) an affirmative answer will not result in rejection of the application;

(b) It is only if upon further inquiry the Committee concludes that the applicant in fact adheres to and supports the views of such an organization and would expect to actively support such views that the recommendation of the Committee would be adverse;

upon the ground that her First and Fifth Amendment privileges are thereby infringed?

Constitutional Provisions, Statutes and Rules Involved

In addition to the constitutional provisions, statutes and rules referred to in Petitioner's Petition, Rules 28(a),

28(c)II, 28(c)V (in part), and Exhibit A, the Questionnaire are involved. These are found in the 1969 Cumulative Pocket Part to Volume 17, Arizona Revised Statutes, Annotated, and are printed as Appendix A hereto.

Statement of the Case

Since Petitioner admits to a full answer to Question 25, i.e., a full listing of all organizations with which Petitioner has been associated since age 16, we may lay aside any consideration of the requirement of Rule 27 that Petitioner tell the Committee whether or not she has ever been a member of the Communist Party.

The question then is whether or not it is permissible for a Supreme Court character committee, charged with the responsibiltiy of investigating the character of applicants for admission to practice law, to require an answer from an applicant as to whether or not such applicant actively adheres to and expects to support and advance a belief that the government of the United States should be overthrown by force and violence.

Apparently Petitioner would reason to the conclusion that if the question asked would permit a plea of the Fifth Amendment in a judicial proceeding the area of impermissible interrogation is broached by such question.

At page 9 of Petitioner's Petition it is argued

> "The lawyer who claims self-incrimination may refuse to answer a question on that ground and will nonetheless remain a member of the bar. The applicant who declines to answer a question because of both First Amendment and Fifth Amendment rights will be excluded from the bar."

Logically, therefore, if this reasoning be sound, an applicant for admission to practice law may also refuse to

answer inquiries as to previous brushes with the law including embezzlement, grand larceny, fraud and like criminal activities.

As to the claim that the refusual of Petitioner to answer question 27 did not obstruct the work of the Committee, the answer is simply that the record is clear that it did.

Under Rule 28 the Supreme Court of Arizona specifically required that this question be put to each applicant. The Committee could not complete its processing of the application unless this question be answered.

All of which brings us to the real question posed by applicant, which is:

May an applicant for a license to practice as an attorney at law be required to disclose if he or she believes that the government of the United States should be overthrown by force and violence and, if so admitted, would espouse, champion and support such a belief?

The answer seems self-evident.

If the responsibilities and privileges of the office of attorney at law, as an arm of the Court, are equated in the view of Petitioner, to the responsibilities of a seaman. a defense worker, a teacher, a post office clerk and a federal health insurance claimant, then, should this Court share that view, perhaps the argument of Petitioner is sound.

Conclusion

The Petition should be denied.

Respectfully submitted,

MARK WILMER
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Phoenix, Arizona 85004
Counsel for Respondent

Appendix A

RULES OF THE SUPREME COURT

V. Admission and Discipline of Attorneys

Rule 28. Examination and Admission

Rule 28(a) Committee on examinations and admissions; powers and duties. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made. The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter may be adopted. The court will then consider the recommendations and either grant or deny admission. As amended effective June 19, 1964.

28(c) Rules governing admission of applicants to the state bar of Arizona, as amended.

II

Except as hereinafter provided in Rule X any person desiring to be admitted to the practice of law in the State of Arizona must file with the Secretary of the Committee on Examinations and Admissions, hereinafter called

"Committee," at the office of the State Bar of Arizona, a written application in substantially the following form:

Application for Examination

To the Committee on Examinations and Admissions of the Supreme Court of Arizona:

I, _____, hereby apply for permission to take the examination to be given in the month of _____ _____ (February or July) of the year 19____.

I am _____ years of age.

I am, or at the time of the examination for which this application is made, I will be an actual and bona fide resident of the State of Arizona, and have been or will have been such resident since the _____ day of _____, 19____, residing at _____ (alone) (with my family consisting of _____). (In case the application is based upon the residence attendance at the College of Law of the University of Arizona or the two semesters provided by subdivision 2 of Rule IV, two semesters provided by subdivision 2 of Rule IV, there should be inserted in lieu of the foregoing statement of bona fide residence the facts showing the residence attendance at the College of Law of the University of Arizona or of the College of Law of Arizona State University required by Rule IV. In such cases the applicant's address at the University of Arizona or Arizona State University and his permanent home address should be given.)

I graduated or will graduate from the _____ Law School, at _____, on the _____ day of _____, 19____.

I am mentally and physically able to engage in active and continuous practice of the law. (If not, state extent of disability.) _____.

The following are the names and addresses of persons by whom the foregoing statements may be verified: _____.

I have never been charged with or convicted of any

felony or of any misdemeanor involving moral turpitude, except the following: _____.

My good moral character will be vouched for by _____ whose occupation is _____, and whose address is _____; by _____ whose occupation is _____, and whose address is _____; and by _____, whose occupation is _____, and whose address is _____.

As a part of this application I (file herewith) (have heretofore filed) my Applicant's Questionnaire and Affidavit.

I agree that I will on the day the examination begins file a further statement on the form to be supplied by the Committee at the time of the notification of the time and place of the giving of the examination of any material changes in or additions to the answers to the Applicant's Questionnaire and Affidavit which have occurred between the date of the filing of said Applicant's Questionnaire and Affidavit and the date of the examination.

Dated this _____ day of _____, 19____.

_____

V

Before acting upon any application the Committee will require the applicant to file with the Committee applicant's questionnaire and affidavit, which is set forth in Exhibit A hereto attached. This shall be on the printed form which will be furnished by the Committee. The applicant's questionnaire and affidavit must be accompanied by (1) the fingerprints of the applicant taken in an approved manner and certified by a municipal police department, a sheriff's office, or other recognized authority acceptable to the Committee, and (2) a dull finish photograph of the applicant's head, neck and shoulders, not larger than 4 inches by 4 inches nor smaller than 3 inches by 3 inches, taken within six months prior to filing with the Committee.

EXHIBIT A

Instructions to the Applicant

All statements are to be based on your own knowledge, unless the statement is expressly qualified to show the source of your information. Answer all questions and make your answers as specific as possible. If the space for any answer is insufficient, you may complete your answer on a separate attached sheet. Please have the answers typewritten if possible.

Applicant's Questionnaire and Affidavit

1. State:
   (a) Full name.
   Social Security Number:
   (b) Have you ever been known by any other name or surname _____; if so state all
   Yes or No
   names used and the places and times thereof. If married woman, give maiden name.
   _____
2. Date of birth _____
   Birthplace _____ Age _____
3. State every residence you have had since you were sixteen years of age:

City and State	Street No.	From (Mo. & Yr.)	To (Mo & Yr.)
Present Address:			
Present Address:			

4. My education was received as follows:
   (a) High School _____
   Name, Location
   Dates of attendance:
   From _____ To _____
   (b) College or University other than law study
   _____
   Name Location

Dates of attendance:
From _____ To _____
(If you did not attend a college, so state)_____

(c) Law Study:
Law Schools _____
Name, Location
Dates of attendance:
From _____ To _____

_____
Name Location
Dates of attendance:
From _____ To _____
Degrees: _____
Yes or No What Degrees
Law Office Study:

_____
Name of firm or employer Address
Dates: From _____ To _____

_____
Name of firm or employer Address
Dates: From _____ To _____

5. Make a complete statement of your practice of the law since first being admitted to practice in any jurisdiction. Include temporary or part-time work. State as to each employment or period of private practice:
   (1) The periods during which you were employed as an attorney or engaged in private practice, with the dates.
   (2) The exact addresses of the offices or places at which you were so employed or engaged and the complete names and present addresses of all such former employers, partners or associates, if any. (If room number of office is known, this should be given. If you shared office space with other lawyers or business firms, please so state and give their full names and present addresses.)
   (3) The nature and extent of your duties or practice.

(4) The reason for the termination of each employment or period of private practice.

(1) (2) (3) (4)

6. Make a complete statement of all employments you have had, or business or occupations in which you have been engaged on your own account, since you became sixteen years of age, other than as set forth in question 5. Include temporary or part-time work. State as to each employment, business, or other occupation:

(1) The periods during which you were so employed or engaged with the dates.

(2) The exact addresses of the offices or places at which you were so employed or engaged and the names and present addresses of all such former employers, partners or associates in business, if any.

(3) The position held by you.

(4) The reason for the termination of each employment, business or other occupation.

(1) (2) (3) (4)

Include complete details regarding any service in the armed forces, i.e., dates of service, rank, serial number, locations, last commanding officer, and your last service address complete. If separated from such service, state nature of such separation and, if other than honorable, specify type thereof and circumstances surrounding your release. Give full particulars as to any complaints or disciplinary proceedings against you.

7. Have you ever held any judicial office?

Yes or No

If so, state where, when, and offices held, and if terminated the reasons therefor:

8. (a) Have you ever held a license, other than as an attorney at law, the procurement of which required proof of good character (i. e., certified public accountant, patent attorney, real estate broker, etc.)

Yes or No

As to each license, state the date it was granted, and the name and address of the authority issuing it.

(b) State every application presented and examination taken by you for a license granted by the state or an official position, the procurement of which required proof of good character. (Specify all examinations whether or not you were successful. Specify every application presented including applications for reinstatement and withdrawn applications and whether or not they were granted.) State as to each application the date, the name and address of the authority to whom it was addressed, and the disposition made of it, with the reasons therefor, and as to each examination the result thereof.

9. Name all jurisdictions and courts in which you have been admitted to practice law. Give dates of admission to practice.
(a) Jurisdiction (b) Courts (c) Date of Admission

10. State every application for admission to the bar made by you EXCEPT those covered by your answers to question 9, the disposition made of each such application, and the reason therefor.

11. Have you registered or taken any other steps looking to taking the examination in any other jurisdiction? _____

Yes or No

If so, give dates and full circumstances. _____

_____

12. Do you intend to take the examination or apply for admission in any other jurisdiction between the date hereof and your admission to the Bar of Arizona, if you qualify? _____

Yes or No

If so, give dates and full circumstances. _____

_____

_____

_____

13. Have you been entitled to practice in each of the locations specified under question 9 and before each court continuously from the date you first became so entitled until the date hereof? _____

Yes or No

If not, state the dates during which you have not been so entitled, the nature of the disqualification, the facts, and the name and address of the person or body in possession of the record thereof.

_____

14. Have you been disbarred, suspended from practice, reprimanded, censured or otherwise disciplined or disqualified as an attorney or member of any profession or organization, or holder of any office, public or private; or have any complaints or charges, formal or informal, ever been made or filed or proceedings instituted against you? _____

Yes or No

If so, state the dates, the facts, the disposition of the matter, and the name and address of the authority in possession of the record thereof.

_____

15. If you have been previously admitted to the bar, state the exact names and addresses of courts before which your former practice of law was chiefly conducted.

_____

Name Location

16. Have you ever held a bonded position? _____
Yes or No

If so, specify nature of position, dates, amount of bond and whether or not any one ever sought to recover upon your bond or to cancel the same. State facts fully, including the name and address of the bonding company, if any.

_____

17. Were you ever dropped, suspended, or expelled from school or college? _____
Yes or No

If so, state facts fully.

_____

18. Were you at any time in the course of your schooling or elsewhere accused of cheating or plagiarism? _____
Yes or No

Give details. _____

19. (a) Have you ever been a party to or had or claimed any interest in any civil proceeding? _____
Yes or No

(b) Have you ever been charged with, arrested, or questioned regarding, the violation of any law? _____
Yes or No

(c) Have you ever been charged with fraud, formally or informally, in any legal proceeding, civil or criminal, or in bankruptcy? _____
Yes or No

(d) Have you ever been declared a ward of any court? _____
Yes or No

(e) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? _____
Yes or No

(f) Have you ever been adjudicated a bankrupt, or has a petition in bankruptcy been filed at any time by you or against you, either alone or in association with others? Have you ever been brought in as a

party to any proceedings in a bankruptcy court; or have you ever been sued or threatened with suit by the receiver, trustee, or other authority of any bankrupt estate, for unlawful preference, conspiracy to conceal assets, or any other fraud or offense, whether punishable by criminal law or not? _____
Yes or No

Give full details for (a), (b), (c), (d), (e), and (f), including dates, exact name and address of the court if any, case numbers, references to the court records if any, the facts, the disposition of the matter; if no court records are available, give to the best of your ability the names and addresses of all persons involved, including counsel. (Include all such incidents no matter how minor the infraction or whether guilty or not.)

_____

_____

20. Are there any unsatisfied judgments against you? _____
Yes or No

If so, list them, giving names and addresses of creditors, amounts, dates and nature of judgment, and reasons for non-payment.

_____

21. (a) State whether or not you are married. _____
Yes or No

If so, give date of each marriage and full name of spouse prior to that marriage.

(b) State whether or not you have ever been divorced. _____
Yes or No

If so, the name of the spouse from whom divorced, the exact name and address of the court, the case number, the date, the ground of divorce, and by whom suit was brought.

_____

(c) If a divorce suit is pending or a marriage has

been annulled, give particulars similar to those requested under (b).

22. State names and addresses of three persons in each locality where you practiced law with whom you are personally acquainted, preferably other than those referred to in your answer to question 5. (If you have not practiced previously, give the same information for each locality in which you have lived.)

Name	Address	Occupation	How long has Known you

23. Give the names and addresses of three attorneys and two clients who know you. These should be other than those supporting your application or named in questions 5 and 22. (If you have not practiced previously, give the names of law school professors, etc.)

Name	Address	Occupation

24. Give the name and location of each bar association of which you are or have ever been a member.
25. List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.
26. Is there any other incident in your career, not hereinbefore referred to having a bearing upon your character or fitness for admission to the Bar?

Yes or No

If so, give full details.

27. Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?

I, _____, hereby apply for a character

report in connection with my application for admission to practice law in the State of Arizona. I agree to give any further information which may be required in connection with my past record, and consent to having this investigation made and such information as may be received reported to the admitting authority.

I agree that I will not receive a copy of the report, or any information received in connection with this application, and I expressly waive any and all rights I might have or claim to such report, any copy thereof, or to know the contents thereof.

_____

Signature

STATE OF _____ } ss.
COUNTY OF _____ }

_____, being duly sworn, says: I have read the foregoing questions and have answered them fully and frankly. The answers are complete and are true of my own knowledge.

_____

Signature of Applicant

Subscribed and sworn to before me this _____ day of _____, A.D. 19____.

_____

Notary Public

Adopted April 1, 1967.

In The
Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1079~~ 15

SARA BAIRD, *Petitioner,*

v.

STATE BAR OF ARIZONA, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR SARA BAIRD

ROBERT H. ALLEN
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In The
Supreme Court of the United States

OCTOBER TERM, 1968

No. 1079

SARA BAIRD, *Petitioner,*

v.

STATE BAR OF ARIZONA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR SARA BAIRD

OPINION BELOW

This case arises on a writ of certiorari to the Arizona Supreme Court. The judgment of that Court, entered on January 14, 1969, is unreported and is without opinion. App. 7. The Arizona Supreme Court's judgment is evidenced by an order entered in the record denying Sara Baird's petition for admission to the State Bar of Arizona. App. 7.

JURISDICTION

The petition for writ of certiorari was docketed in this Court on February 21, 1969. This Court has jurisdiction under 28 U.S.C. § 1257(3). Jurisdiction to review demands for admission to state bar associations when federal questions are involved

is confirmed in *Konigsberg v. State Bar of California,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

QUESTION PRESENTED

May a fully qualified applicant for admission to the bar, who has identified all organizations with which she has been affiliated since becoming 16, be excluded from the practice of law solely because she refuses to answer the further question, "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?," particularly when the express purpose for that question is to inquire into her beliefs and views? The applicant's refusal to answer this question is based upon the guarantee of freedom of speech and association under the First Amendment of the United States Constitution, the self-incrimination clause of the Fifth Amendment of the United States Constitution, both as made applicable to the states by the Fourteenth Amendment of the United States Constitution, and the due process clause of that Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 2385 (Supp. 1969) (the Smith Act) provides in pertinent part:

"Whoever organizes or helps or attempts to organize any

society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof —

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both . . . ."

ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969) provides in pertinent part:

"A person who knowingly or wilfully becomes or remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state."

ARIZ. S. CT. R. 28(c) (Supp. 1969) requires answers under oath to, among other questions, these:

"25. List all organizations, associations and club [sic] (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.

. . . .

"27. Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

STATEMENT OF THE CASE

Petitioner, Sara Baird, graduated from Stanford University Law School in June, 1967. In February, 1968 she took the Arizona Bar examination, which she passed.[1] Subsequently, the

[1] The State Bar Committee on Examinations and Admissions has admitted that the only reason for its refusal to recommend her for membership in the bar is her failure to answer the question, the constitutionality of which is challenged by this brief. Petition ¶1, ¶2, Committee Response ¶2, App. 2, 4. The Committee acknowledges that if she answered the question to the Committee's satisfaction, the Committee would have no legal basis upon which to exclude her from the practice of law. Committee Memorandum at 7-8, App. 6.

State Bar Committee on Examinations and Admissions (hereinafter referred to as the "Committee"), refused to process her application further and to recommend her for admission to the Arizona State Bar Association.

The Committee's position was based solely upon the fact that petitioner declined to answer question 27 of the "Applicant's Questionnaire and Affidavit," set forth in Arizona Supreme Court Rule 28(c) (Supp. 1969). Committee Response ¶2, App. 4. Question 27 reads as follows: "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?" App. 18.

On the same "Questionnaire and Affidavit" petitioner answered question 25, which reads as follows:

> "List all organizations, associations, and club [*sic*] (other than Bar associations) of which you are or have been a member since attaining the age of 16 years." App. 18.

The Committee's express purpose in requiring an answer to question 27 was not to discover petitioner's past or present conduct but rather to assure the Committee that petitioner does not adhere to an unorthodox political belief. This was made clear by the Committee's Memorandum, filed in the court below:

> *"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate.* The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to *an investigation and interrogation* as to *whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. *If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission."* App. 5-6 (emphasis supplied).

"I also believe that Mrs. Baird should realize that even though she answered the question that she had at one time been a Com-

munist or had otherwise been associated with organizations not regarded as friendly to the United States Government, this would not necessarily cause us to reject her application. *We would undoubtedly want to ask her some questions as to her present beliefs* and as to other matters which would bear upon the effect such membership would have on her qualifications to practice law." App. 6 (emphasis supplied).

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' *the committee will then endeavor to ascertain if Sara Baird does adhere to the view* that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she *would expect* to actively support such views. *If this is the conclusion reached by the committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona.* Should the conclusion be that her membership is of a nominal character and that she does not *participate and adhere to the views* that a violent overthrow of our government is desirable, then the committee would have no legal basis for refusing to recommend her for admission. . . ." App. 6 (emphasis supplied).

Under the review procedure outlined in Arizona Supreme Court Rule 28(c) (Supp. 1969), petitioner filed a verified petition and a memorandum of points and authorities with the Arizona Supreme Court on December 20, 1968. The petition read in part as follows:

". . . to require petitioner to answer Question No. 27 as a condition to processing her application for admission to the State Bar of Arizona or as a condition to her admission to the Bar is a violation of petitioner's rights under the Constitution of the State of Arizona and under the Constitution of the United States, particularly the First Amendment, as to freedom of speech and association, the Fifth Amendment, as to self-incrimination, and the Fourteenth Amendment, as to due process of law and equal protection, both separately and as making applicable to state action the First and Fifth Amendments to the United States Constitution." App. 3.

Thereafter, an order to show cause was issued, directing the Committee to show cause ". . . why petitioner's application should

not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit." Order to Show Cause at 1. Subsequently, the Committee filed its response, together with a memorandum of points and authorities, admitting that the refusal to answer question 27 was the reason for not processing her application or for recommending her for membership in the Bar Association, and denying that petitioner's constitutional rights were infringed by making an answer to question 27 prerequisite for permission to practice law in Arizona. Committee Response, App. 4, 5.

On January 14, 1969, oral argument was presented to the Arizona Supreme Court. Immediately thereafter, the Arizona Supreme Court entered an order, without opinion, denying the petition. The issue in the petition was whether constitutional rights had been denied. No state ground, adequate or otherwise, was raised by the Committee. The petition for certiorari was granted on April 7, 1969.[2]

SUMMARY OF ARGUMENT

The issue in this case is whether a bar applicant who has disclosed to a bar examining committee all organizations of which she was a member since age 16, must also state under oath, as a condition for admission to the Arizona bar, whether she has ever been a member of the Communist Party or any organization which advocates overthrow of the United States government

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[2] In the Court below, argument was presented by counsel for petitioner on the one side and the Committee on Examinations and Admissions on the other side. When the petition for certiorari was filed, the Committee was named and served as respondent. The Committee's response suggested that the members of the Arizona Supreme Court should themselves be the responding parties. Subsequently, and well within the 90-day period, each of the Arizona Supreme Court Justices was served and proper certification of service was filed. Under U.S. S. Ct. R. 21(6), the Clerk of this Court was asked in writing to deem the Justices as parties to this action. Thereafter, the Clerk of this Court held the petition briefly, and notified the Arizona Supreme Court of its right to respond. The Arizona Justices did not respond. Hence, the petition for certiorari was presented to this Court with the bar applicant as petitioner and the Committee as respondent.

by force or violence. The latter question, number 27, is expressly used by the bar Committee to search out the applicant's beliefs, rather than conduct. The Committee states that if the question is answered in the affirmative, "[w]e would undoubtedly want to ask her some questions as to her present beliefs. . . ." App. 6. If her "beliefs" are unacceptable, the Committee ". . . will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona." *Id.* Petitioner declined to answer question 27 and was denied admission to the State Bar of Arizona for that reason alone by the Arizona Supreme Court.

The decision below violates petitioner's freedom of belief and thought, guaranteed by the First Amendment and historically accorded the highest protection by this Court. Since exclusion from the practice of law is punishment, *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), and since the Committee uses question 27 to exclude applicants for their political opinions, question 27 is "frankly aimed at the suppression of dangerous ideas" and is therefore unconstitutional. *Speiser v. Randall,* 357 U.S. 513, 519, 78 S. Ct. 1332, 1338, 2 L. Ed. 2d 1460 (1958).

Question 27 is functionally a test oath — a device which historically has been used to suppress heretical opinion. Resistance to such test oaths is longstanding and recently there has been a sharp rise in judicial hostility toward various oaths and loyalty programs. *See Cramp v. Bd. of Public Instruction,* 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Whitehill v. Elkins,* 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d. 228 (1967); *Keyishian v. Bd. of Regents,* 385 U.S 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

The decision below violates the freedom of association, also guaranteed by the First Amendment. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). The deterrent effect upon association results from disclosure itself, from the difficulty in answering the question properly under the

subtle elements of the Smith Act, and from the fact that the question's ultimate aim is to penalize political beliefs. There is no "controlling justification" or "overriding and compelling state interest" to support the imposition of question 27. *N.A.A.C.P. v. Alabama, supra* 357 U.S. at 466, 78 S. Ct. at 1174; *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963).

Neither *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), nor *In re Anastaplo,* 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961), is controlling. There, bar applicants disclosed their beliefs but not their political affiliations. The majority in *Konigsberg* noted that there ". . . is no showing of an intent to penalize political beliefs." *Id.* at 54, 81 S. Ct. at 1009; *see In re Anastaplo, supra,* 366 U.S. at 95 & n.17, 81 S. Ct. at 986 & n.17. By contrast, petitioner has listed all associations since age 16 and refuses to answer a question which is candidly aimed at penalizing political belief. There is neither evidence nor rational finding of any "obstruction" in the present case. *Konigsberg* and *Anastaplo* are anomalies when compared with recent freedom of association cases and, at the very least, should be limited to cases not involving an intent to punish political opinion.

Question 27 is overly broad in scope and violates the general principles in *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966). Since the question is not limited to disclosures involving specific intent to overthrow the government and active membership, the question intrudes into protected areas of association. However, the overbreadth principle should not be extended to the present case to permit a narrower formulation of the inquiry. The burdens on an applicant in answering such a question would not be lightened, the deterrent effects on belief and association would not be reduced, and sanctions would still remain to make costly the assertion of the privilege against self-incrimination.

Question 27 conflicts with due process because it lacks any

rational connection with the applicant's fitness or capacity to practice law. *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957). Having supplied information required under the mandate of *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and having listed all associations since age 16, no inference of bad moral character can be drawn from petitioner's refusal to answer question 27. The only conceivable nexus between the unanswered question and moral character would be an actual violation of the Smith Act membership clause. However, any determination of guilt under the Smith Act can be made only by a federal court, which has exclusive jurisdiction, and not by a state bar Committee. 18 U.S.C. § 3231; *Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

Question 27 is arbitrary because it results in suppression of unpopular political beliefs and associations as a condition of admission to the bar. Such prerequisites of orthodoxy adversely affect the independence of the bar and the availability of legal counsel for unpopular causes and individuals.

Petitioner has also asserted her privilege against self-incrimination, since an applicant's possible answer to question 27 could either be directly incriminating or a link in a chain of incriminating circumstances under the Smith Act or the Arizona Sedition Act. Since the privilege protects the innocent as well as the guilty, *Ullman v. United States,* 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 (1956), its invocation does not hinge on what an applicant's answer to question 27 would be in actual fact. It is sufficient that a possible answer be incriminating. Since the privilege may be claimed in a bar proceeding, and since petitioner has been denied her legal career because she claimed the privilege, the decision below violates the principle of *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). *Spevack,* a disbarment case, should apply as well to admission proceedings. The prohibited penalty for asserting the privilege, the denial of means of livelihood, is the same in either context.

Petitioner should not be denied admission to the bar simply because she has asserted her Fifth Amendment right.

ARGUMENT

I. *Introduction.*

Sara Baird has met all of the requirements for admission to the State Bar of Arizona. However, she declines to answer question 27, which requires her to tell the Committee whether she has ever been ". . . a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." According to the Arizona Supreme Court, she can be kept from practicing law for this refusal.

Question 27 orders petitioner to go beyond question 25, which asked her to list all organizations with which she has been associated since the age of 16. Question 27 requires her to make a judgment, under penalty of perjury, whether any group to which she belongs or has belonged is the Communist Party or is an organization which advocates the overthrow of the United States Government by force or violence. Perjury is a felony in Arizona. *See* ARIZ. REV. STAT. ANN. § 13-561.

The Committee's purpose in requiring an answer to question 27 is not to gather information about petitioner's associations — she has already listed these in response to question 25. The Committee in effect admits this in its response to the petition for writ of certiorari:

> "Since Petitioner admits to a full answer to Question 25, *i.e.*, a full listing of all organizations with which Petitioner has been associated since age 16, *we may lay aside any consideration of the requirement of Rule* [*sic*] *27 that Petitioner tell the Committee whether or not she has ever been a member of the Communist Party.*" Opposition Brief at 3 (emphasis supplied).

The Committee's purpose in requiring an answer to question 27 is to determine whether petitioner subscribes to unorthodox "beliefs" or "views." As stated by the Committee in its response filed with the Arizona Supreme Court, if ". . . the applicant *presently entertains the view* that a violent overthrow of the

United States Government is something to be sought after . . . *then indeed we would reject the application and recommend against admission.*" App. 5, 6 (emphasis supplied). In fact, the premise upon which an answer to question 27 is deemed "appropriate" by the Committee is that belief alone can disqualify one from practicing law: *"Unless we are to conclude* that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, *then* an answer to this question is indeed appropriate." App. 5 (emphasis supplied).

The Committee reaffirmed this concern with political belief in its response to the petition for writ of certiorari:

> "The question then is whether or not it is permissible for a Supreme Court character committee, charged with the responsibility of investigating the character of applicants for admission to practice law, to require an answer from an applicant as to whether or not such applicant *actively adheres to and expects to support and advance a belief* that the government of the United States should be overthrown by force and violence." Opposition Brief at 3 (emphasis supplied).

The Committee cannot so condition the right to practice law. It may not thus violate the First Amendment freedom of belief and association, the guarantee of due process and the privilege against self-incrimination. The Committee cannot use question 27, in function a traditional test oath, to make political orthodoxy a prerequisite for practicing law. Americans are entitled to practice law and the American people are entitled to lawyers without regard to whether their beliefs conform to the bar examiners' social and political attitudes.

II. *The Arizona Supreme Court Decision Violates the Freedom of Belief as Guaranteed by the First Amendment.*

A. *Question 27's Purpose is to Ascertain and Penalize Unorthodox Political Beliefs.*

This Court has held that exclusion from the practice of law is a penalty, since ". . . exclusion from any of the professions . . . can be regarded in no other light than as punishment. . . ."

Ex parte Garland, 4 Wall. 333, 377, 18 L. Ed. 366 (1867); *see also Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959) (there is a "right to hold specific employment"); *United States v. Brown,* 381 U.S. 437, 458, 85 S. Ct. 1707, 1720, 14 L. Ed. 2d 484 (1965) ("It would be archaic to limit the definition of 'punishment' to 'retribution'."). Thus, the practice of law "is a right," *Ex parte Garland, supra* 4 Wall. 333, 379, and is "not a matter of the State's grace." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 n.5, 77 S. Ct. 752, 756 n.5, 1 L. Ed. 2d 796 (1957).

Question 27 is an integral part of a process designed to punish or exclude bar applicants because of their unorthodox political "beliefs" and "views" or political opinions. Question 27 therefore violates the First Amendment and petitioner may validly refuse to answer such an inquiry.

Before delving into sensitive[3] political associations and into an area protected by the First Amendment by the imposition of question 27, the Committee must first have a "controlling justification," *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 2d 1488 (1958), and an "overriding and compelling State interest," *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed 2d 929 (1963).

The Committee states that the "controlling justification" or "overriding and compelling State interest" behind question 27 is to identify and exclude from the practice of law those who answer "yes" to question 27 and who "believe" in the overthrow of the government. The Committee's fundamental rationale or hypothesis is as follows: *"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice*

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[3] *Cf. Wieman v. Updegraff,* 344 U.S. 183, 190-91, 73 S.Ct. 215, 218, 97 L.Ed. 216 (1952) ". . . the consequences visited upon a person excluded from public employment on disloyalty grounds . . . [have] become a badge of infamy."

law in our Arizona courts, then an answer to this question is indeed appropriate." App. 5 (emphasis supplied).

In practice, question 27 is a clumsy device for seeking out these beliefs; it acts as a trigger for an "investigation and interrogation," not into illegal conduct, but rather into an applicant's political "beliefs" and "views." As the Committee states, an affirmative answer to question 27

> "*. . . would lead to an investigation and interrogation as to whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. *If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission.*" App. 5-6 (emphasis supplied).

The rejection would be based primarily and perhaps even exclusively on the applicant's political opinions.

B. *As an Integral Part of a Plan to Disqualify Bar Applicants For Their Political Beliefs, Question 27 Violates the First Amendment.*

Statutes aimed at penalizing political beliefs violate the First Amendment. *Speiser v. Randall,* 357 U.S. 513, 519, 78 S. Ct. 1332, 1338, 2 L. Ed. 2d 1460 (1958), held the denial of a veteran's tax exemption unconstitutional mainly because "*[t]he denial is 'frankly aimed at the suppression of dangerous ideas.'*" (emphasis supplied). With the exemption dependent upon the execution of an affidavit proclaiming nonadvocacy of the government's overthrow, the ultimate burden of proof affected First Amendment freedoms by causing individuals to "steer far wider of the unlawful zone." *Id. at* 526, 78 S. Ct. at 1342. The statute ". . . purports to deal directly with speech and the expression of political ideas." *Id.* at 527, 78 S. Ct. at 1343.

In Arizona, "the practice of law is not a privilege but a right," *Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967), an interest far more precious than the tax exemption in *Speiser.* In *Speiser,* the intention to inspect beliefs was not overtly avowed, except as it appeared on the face of the question.

Here, the Committee proclaims openly that political belief is its ultimate target.

If the applicant is placed under oath while the Committee examines his beliefs, then the threat of perjury rounds out a situation to which Justice Jackson addressed himself in *American Communications Ass'n v. Douds,* 339 U.S. 382, 437, 70 S. Ct. 674, 703, 94 L. Ed. 925 (1950):

> ". . . I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has had no outward manifestation. *Attempts of the courts to fathom modern political meditations of an accused would be as futile and mischievous as the efforts in the infamous heresy trials of old to fathom religious beliefs.*" (concurring in part and dissenting in part) (emphasis supplied).[4]

We live in a world in which man is confined by society in countless ways. His house is built according to codes, his breakfast is subject to countless food regulations, his children go to regulated schools and his job is subject to all sorts of laws. He may be required off the street by a curfew. But in all this network of controls, there is one thing that is left to the man absolutely and totally, and that is his beliefs. His is the unfettered right to believe and think as he chooses. As stated in *Schneiderman v. United States,* 320 U.S. 118, 144, 63 S. Ct. 1333, 1346, 87 L.

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[4] It may be suggested that *American Communications Ass'n v. Douds,* 339 U.S. 382, 386, 70 S. Ct. 674, 677, 94 L. Ed. 925 (1950), permits the control of beliefs. There is a two-point reply to this assertion. First, the *Douds* majority wrote: ". . . we have here no statute which is . . . frankly aimed at the suppression of dangerous ideas. . . ." 339 U.S. at 402, 70 S.Ct. at 686. Subsequent cases expressly noted this feature in *Douds. E.g., Dennis v. United States,* 341 U.S. 494, 507, 71 S. Ct. 857, 866, 95 L. Ed. 1137 (1951); *Speiser v. Randall,* 357 U.S. 513, 527, 78 S. Ct. 1332, 1343, 2 L. Ed. 2d 1460 (1958). Second, *Douds* is described today as being "eviscerated" by *United States v. Brown,* 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). NOTE, *Loyalty Oaths,* 77 YALE L. J. 739, 742 (1968).

Ed. 1796 (1943), "[i]f any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guarantees of the Bill of Rights and especially that of freedom of thought contained in the First Amendment." Hence, whether religious, *e.g., Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940) ("Thus the [First] Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute. . . ."), or political, *Thomas v. Collins,* 323 U.S. 516, 531, 65 S. Ct. 315, 323, 89 L. Ed. 430 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience."), this Court has accorded almost[5] complete protection to freedom of belief saying that the First Amendment ". . . creates a preserve where the views of the individual are made inviolate." *Schneider v. Smith,* 390 U.S. 17, 25, 88 S. Ct. 682, 687, 19 L. Ed. 2d 799 (1968).

While the protection of belief may be justified in terms of privacy,[6] constitutional protection against governmental intrusion into belief was given by the First Amendment: "The constitu-

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[5] There have been a few cases where beliefs have not been fully protected. *E.g., United States v. Schwimmer,* 279 U.S. 644, 49 S. Ct. 448, 73 L. Ed. 889 (1929) (an alien was denied citizenship because of her belief in pacifism); *Macintosh v. United States,* 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302 (1931) (an alien was denied citizenship because he would not promise in advance to bear arms); *In re Summers,* 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945) (a bar applicant was denied admission because of his belief in pacifism). However, *United States v. Schwimmer,* and *Macintosh v. United States,* were overruled in *Girouard v. United States,* 328 U.S. 61, 69, 66 S. Ct. 826, 830, 90 L. Ed. 1084 (1946): "We conclude that the *Schwimmer, Macintosh* and *Bland* cases do not state the correct rule of law." Moreover, the Court expressly noted that "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. . . ." Hence, *Girouard v. United States, supra* 328 U.S. at 64, 66 S. Ct. at 827, casts considerable doubt upon the validity of *In re Summers, supra.*

[6] *Cf. Schneiderman v. United States,* 320 U.S. 118, 136, 63 S. Ct. 1333, 1342, 87 L. Ed. 1796 (1943) (". . . under our traditions beliefs are personal. . . ."); *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965).

tional fathers, fresh from a revolution, did not forge a political straitjacket for the generations to come. Instead they wrote . . . the First Amendment, guaranteeing freedom of thought. . . ." *Schneiderman v. United States,* 320 U.S. 118, 137, 63 S. Ct. 1333, 1342-43, 87 L. Ed. 1796 (1943). This was expounded eloquently in Justice Jackson's famous paragraph in *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

To illustrate the inalienable nature of freedom of belief, some of our most distinguished Americans have expressed and tolerated the very belief which is so abhorrent to the Committee. Abraham Lincoln said in an address to the House of Representatives on January 12, 1848: "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable, — a most sacred right — a right, which we hope and believe, is to liberate the world." I BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 438 (1953). Thomas Jefferson, another lawyer, took a very bold and tolerant view: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson, First Inaugural Address, March 4, 1801; I J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 309, 310 (1897); *see* DECLARATION OF INDEPENDENCE.

This robust attitude of our nineteenth century fathers may be medicine too strong for some in the twentieth century, but surely this Court will stand with the argument of Charles E. Hughes when in 1920 he protested the refusal of the New York Assembly to seat five members of the Socialist Party: ". . . it is of the essence

of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts. . . ." 5 N.Y.L. Doc., No. 30, 143d Sess., p. 4 (1920).

Lawyers should be able to hold any beliefs they desire. *See In re Clifton*, 33 Idaho 614, 196 P. 670 (1921) (where disbarment was denied and it was held that a lawyer's pro-German attitude toward World War I did not prevent him from supporting or obeying the law). As a result, a person has a "right" to practice law and "can only be deprived of it for *misconduct*," consisting of "moral or professional delinquency." *Ex parte Garland*, 4 Wall. 333, 378, 379, 18 L. Ed. 366 (1867) (emphasis supplied). It cannot be deprived because of political belief. This philosophy was summed up by Robert E. Seiler, Esq., Secretary of the Missouri Board of Law Examiners:

> ". . . *I do not think that inquiry into political beliefs has any place in bar examination work.* I think that the study of law is the best training anyone can have for becoming a good American and I do not think it should be cluttered up with investigations about political beliefs and whether or not the applicant happens to agree with what a majority of the people may or may not consider at the moment to be subversive." Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 508 (1953) (emphasis supplied).

C. *The Requirement is in Function an Unconstitutional Test Oath.*

An oath of office is a pledge to maintain a standard of performance, an oath which embodies the duties owed by a citizen even in the absence of the oath, *Imbrie v. Marsh*, 3 N.J. 578, 592-93, 71 A.2d 352, 360 (1950), and which can be broken only by an act and not by a belief. The oath to support the Constitution of the United States, sanctioned in U.S. CONST. art. II, § 1, cl. 7 and art. VI, § 3, and in U.S. S. CT. R. 5, is the leading example of an oath of office. *See also* 31 & 32 Vict., c. 72 (1868); III THE LAW REPORTS, THE STATUTES 519 (1868) (an English oath of allegiance). The term "test oath" is applied to an oath

required as a condition of employment. In contrast to the oath of office, the "test oath" exacts avowals or disavowals of specified beliefs and associations, usually religious or political. *Imbrie v. Marsh,* 5 N.J. Super. 239, 245, 68 A.2d 761, 764 (1949), *aff'd,* 3 N.J. 578, 71 A.2d 352 (1950).

The "test oath" is an ancient device for weeding out heretical views. In the sixteenth century, Henry VIII, in his struggle for power against the Pope, required of his subjects an oath that they renounce the power of the Pope without distinguishing between the Pope's political and spiritual power. 35 Hen. 8, c. 1 (1544), III DAWSONS STATUTES OF THE REALM 956-57 (Reprinted ed. 1963). There were many variants of the test oath, each aimed at eliminating whatever persuasions were considered to be dangerous and heretical at the time.[7] The penalties for refusal to take such an oath could be not merely exclusion from office, but death. Koenigsberg & Starvis, *Test Oaths: Henry VIII to the American Bar Association,* 11 LAW. GUILD REV. 111, 114 (1951).

Resistance to test oaths is not some contemporary afterthought. As is legendary, Thomas More resisted an oath prescribed by Henry VIII. BOLT, A MAN FOR ALL SEASONS (1960). Repulsion toward test oaths is at the very root of the existence of our Constitution, for it was the desire to escape such oath-taking that drove many of the settlers who founded this country to its shores.

Question 27 is functionally a test oath. The applicant for bar

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[7] 28 Hen. 8, c. 7, 10 (1536), III DAWSONS STATUTES OF THE REALM 661, 663-64 (Reprinted ed. 1963); 5 Eliz., c. 1 (1563), IV DAWSONS STATUTES OF THE REALM pt. 1, 403 (Reprinted ed. 1963); 3 Jac. 1, c. 4 (1606), IV DAWSONS STATUTES OF THE REALM pt. 2, 1074 (Reprinted ed. 1963); 14 Car. 2, c. 4 (1662), V DAWSONS STATUTES OF THE REALM 365 (Reprinted ed. 1963); 25 Car. 2, c. 2 (1672), which invokes 3 Jac. 1, c. 4 (1605), V DAWSONS STATUTES OF THE REALM 782 (Reprinted ed. 1963). For discussion of test oaths, *see generally* dissenting opinion of Mr. Justice Black in *American Communications Ass'n v. Douds,* 339 U.S. 382, 447-48, 70 S. Ct. 674, 708-09, 94 L. Ed. 925 (1950); Koenigsberg & Starvis, *Test Oaths: Henry VIII to the American Bar Association,* 11 LAW. GUILD REV. 111 (1951).

admission is required as a condition to practicing law to answer, under oath, whether she has ever been a member of the Communist Party or any other organization that advocates overthrow of the United States Government by force or violence. She is thus required to take an oath concerning what the organizations with which she has been affiliated actually advocate. The oath involves no promise of future performance; it is an inquiry initially into unorthodox association. By express declaration of the Committee, this question may be augmented by interrogation into her personal beliefs. If petitioner states that she has been a member of organizations which expound heretical views and if she expresses, during the promised inquiry, political opinions which are unacceptable to the Committee, then she will be denied the right to practice law.

Contemporary test oaths, the so-called "loyalty oaths," are usually conditions of employment. An early instance of judicial antipathy toward this kind of oath was *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366 (1867). In recent times, loyalty oaths have been treated with renewed hostility. Starting with *Wieman v. Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952), which demanded knowing membership, subsequent cases have invalidated various loyalty oaths and loyalty programs at an increased tempo. *See Cramp v. Board of Pub. Inst.*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Whitehill v. Elkins*, 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). These cases which follow the over-breadth and vagueness tests are variant in their individual applications but unmistakable in their overall trend — the unacceptability of test oaths. *See generally* NOTE, *Loyalty Oaths*, 77 YALE L. J. 739 (1968). Question 27 is equally unacceptable.

III. *The Question Violates Petitioner's Freedom of Association, Protected by the First Amendment.*

A. In Light of the First Amendment, the Question Puts an Unconstitutional Burden on the Applicant.

To answer question 27, the applicant must state under penalty of perjury whether any of the named organizations listed in response to question 25 is ". . . the Communist Party or any organization that advocates the overthrow of the United States Government by force or violence." This is no easy task even for a law school graduate since Smith Act offenses involve "subtler elements than are present in most other crimes. . . ." *Scales v. United States,* 367 U.S. 203, 232, 81 S. Ct. 1469, 1487, 6 L. Ed. 2d 82 (1961).

Apart from Fifth Amendment considerations, the applicant must determine whether any of the named organizations presently engages in proscribed advocacy, even though he may have left the organization years ago. *Noto v. United States,* 367 U.S. 290, 298, 81 S. Ct. 1517, 1521, 6 L. Ed. 2d 836 (1961) (". . . it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause.").

In light of *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), which said that past membership alone is not bad moral character, and *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966), which held generally that loyalty enforcement statutes could not apply to mere knowing membership, the applicant might conclude that question 27 only asks for violations of the Smith Act membership clause. If so, the applicant must also decide: (1) Whether the applicant became or remained a member of such an organization "knowing the purposes thereof. . . ." 18 U.S.C. § 2385 (Supp. 1969). (2) Whether the applicant was an "active" member of such a group. *Scales v. United States,* 367 U.S. 203, 222, 81 S. Ct. 1469, 1482, 6 L. Ed. 2d 82 (1961).

(3) Whether the applicant had "specific intent" to accomplish the organization's illegal aims by resort to violence. *Id.* at 221, 229, 81 S. Ct. at 1482, 1486.

Imposing this burden of difficult judgments upon individuals in this Smith Act or loyalty area violates the First Amendment. *Speiser v. Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958). Although concentrating mainly upon the burden of proof and persuasion, *Speiser* recognized the inherent difficulties when the individual rather than the state is called upon to deal with the substantive principles in the area of loyalty:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. *This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. Dennis v. United States, supra, provide but shifting sands on which the litigant must maintain his position.*" 357 U.S. at 526, 78 S. Ct. at 1342 (emphasis supplied).

The possible penalty for mistaken judgment when answering question 27 is a perjury charge and perhaps exclusion from the practice as well. Even though the perjury charge would be unfounded because the mistake would lack intent, the problem is not thereby washed away. As stated by this Court in a First Amendment case involving vagueness,

> "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."
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> *"Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of prosecution cannot be gainsaid.* The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'free dissemination of ideas may be the loser.'" *Baggett v. Bullitt,* 377

U.S. 360, 373, 374, 84 S. Ct. 1316, 1323, 1324, 12 L. Ed. 2d 377 (1964) (emphasis supplied).

B. *There is No Controlling or Compelling State Interest to Justify the Imposition of Question 27 Upon Petitioner.*

Freedom of association is protected by the First Amendment. As this Court said in *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958), ". . . freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." And freedom of association has long been a part of American life.[8]

This Court has repeatedly observed that ". . . compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . ." since "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462, 78 S. Ct. at 1171, 1172; *Bates v. Little Rock,* 361 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960) (". . . the deterrence of free association which compulsory disclosure of the membership lists would cause."); *Shelton v. Tucker,* 364 U.S. 479, 485-86, 81 S. Ct. 247, 251, 5 L. Ed. 2d 231 (1960) ("... to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association. . . .").

In deciding whether disclosure may be compelled, the prevailing approach has been to weigh the interests involved in each individual case: "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always

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[8] As De Tocqueville observed, "[t]he right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people. At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority" and "[t]he right of association therefore appears to me almost as inalienable in its nature at the right of personal liberty." DE TOCQUEVILLE, DEMOCRACY IN AMERICA 97, 98 (Mentor ed. 1956).

involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt v. United States,* 360 U.S. 109, 126, 79 S. Ct. 1081, 1093, 3 L. Ed. 2d 1115 (1959).

Before the individual's interest is outweighed and before the state may require disclosure, the state's interest or purpose for the inquiry must be very substantial indeed. For example, compelled disclosure of membership lists in *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 2d 1488 (1958), was denied because ". . . Alabama has fallen short of showing a *controlling justification* for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." (emphasis supplied). The same was true in *Bates v. Little Rock,* 316 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960). Later, in *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963), the criteria became even more demanding of the state as disclosure of memberships was prohibited because there was no ". . . *overriding and compelling state interest.*" (emphasis supplied); *see also Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 11, 21 L. Ed. 2d 24 (1968) ("compelling interest").[9]

The interest of petitioner is the protection of her First Amendment rights. Having listed each organizational membership since age 16, petitioner is at least entitled to draw the line on a question which imposes significant burdens on the applicant and which is aimed ultimately at penalizing political belief.

Wholly apart from whether question 27 actually accomplishes its objective, the purpose for question 27 is neither "controlling" nor "compelling" and must be outweighed by the interests of petitioner. Question 27's purpose comes nowhere near the kinds of interests which have outweighed First Amendment considerations in the past. *E.g., Barenblatt v. United States,* 360 U.S. 109,

[9] One would think that the compelling interest of the state would be to uphold the First Amendment to the Constitution!

127-28, 79 S. Ct. 1081, 1093, 3 L. Ed. 2d 1115 (1959) ("self-preservation"); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 93-94, 81 S. Ct. 1357, 1409, 6 L. Ed 2d 625 (1961) (national protection against world-wide, foreign-controlled, totalitarian threat); *Wilkinson v. United States*, 365 U.S. 399, 402, 81 S. Ct. 567, 569, 5 L. Ed. 2d 633 (1961) (subversive infiltration and propaganda in the South).

C. *The Konigsberg and Anastaplo Cases Do Not Control and Warrant Review In Light of Recent Decisions.*

1. *Neither Konigsberg nor Anastaplo is applicable.*

The absence of any substantial or even legitimate purpose for question 27 can be shown by comparing the case at hand with *Konigsberg v. State Bar*, 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and *In re Anastaplo*, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961). Both of these cases held in favor of the respective bar examining committees, both weighed the competing interests involved, both permitted inquiries into associations and both found the bar applicants to have obstructed the screening process. However, the state interest was much stronger in *Konigsberg* and *Anastaplo* than in the present case.

Factually, the instant case is almost the converse of *Konigsberg* and *Anastaplo*. In *Konigsberg* and *Anastaplo*, both applicants disclosed their "beliefs," *Konigsberg v. State Bar, supra* 366 U.S. at 39, 81 S. Ct. at 1000; *In re Anastaplo, supra* 366 U.S. at 85, 81 S. Ct. at 981, but declined to answer questions regarding their political affiliations: Konigsberg refused ". . . to answer any questions relating to his [possible] membership in the Communist Party," *Konigsberg v. State Bar, supra* 366 U.S. at 39, 81 S. Ct. at 1000, and Anastaplo steadfastly ". . . refused . . . to answer whether he was a member of the Communist Party or of any other group named in the Attorney General's list of 'subversive' organizations. . . ." *In re Anastaplo, supra* 366 U.S. at 86 n.7, 81 S. Ct. at 981 n.7.

Petitioner in the present case has done almost the reverse. She

has listed each and every association since age 16 and yet she refuses to answer a question which is aimed at ascertaining and ultimately penalizing political belief.

The present case is even more sharply set apart from *Konigsberg* and *Anastaplo* by the Committee's candid admission that question 27 is intended to disqualify applicants because of their political opinions. By contrast, there was no intent to penalize political belief in either *Konigsberg* or *Anastaplo*. In distinguishing *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the majority in *Konigsberg* wrote that "[i]t would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that *Speiser* was *explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs.*" 366 U.S. at 54, 81 S. Ct. at 1009 (emphasis supplied). And in *In re Anastaplo, supra*, the majority was not sanctioning an exclusion based on the applicant's views: ". . . there is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical government." 366 U.S. at 95 & n.17, 81 S. Ct. at 986 & n.17.

Furthermore, there has been no obstruction in the present case. Petitioner has answered question 25 and has named all of her memberships since age 16 to the best of her ability. Hence, there are no "gaps" to fill[10] and the "investigatory record" is not left in "sufficient uncertainty," as was the case in *Konigsberg v. State Bar, supra* 366 U.S. at 45, 46, 81 S. Ct. at 1003, 1004. The Com-

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[10] An answer to question 27 could furnish the Committee with names of organizations not previously given because question 25 requests information only about memberships occurring *after* an applicant becomes 16. However, the importance of preadolescent memberships must surely either be stale, *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 829, 86 S. Ct. 1148, 1151, 16 L. Ed. 2d 292 (1966), or be without any "rational connection" to petitioner's qualifications as a lawyer. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957).

mittee simply has asserted or perhaps even assumed that there was obstruction: "As to the claim that the refusal of Petitioner to answer question 27 did not obstruct the work of the Committee, the answer is simply that the record is clear that it did." Opposition Brief to Petition for Certiorari at 4. The Committee has made no finding of obstruction or even explained how petitioner has thwarted legitimate inquiry. *See Wood v. Georgia,* 370 U.S. 375, 386-89, 82 S. Ct. 1364, 1371-72, 8 L. Ed. 2d 569 (1962) (wherein specific findings of fact were required to support a ruling against First Amendment freedoms); *see also Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957) (". . . officers of a State cannot exclude an applicant when there is no basis for their finding. . . .").

The *Konigsberg* mandate to avoid "obstruction" cannot be so broad as to force bar applicants to abandon their right to resist questions which are posed for impermissible purposes and which have detrimental First Amendment effects. In the legislative investigation area where "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action," *Watkins v. United States,* 354 U.S. 178, 187, 188, 77 S. Ct. 1173, 1179, 1 L. Ed. 2d 1273 (1957), indicated that there was a boundary on this duty where "political belief and association" are abridged. The same type of limit must be placed on bar committee inquiries.

2. *The doubtful validity of the Konigsberg and Anastaplo cases.*

Konigsberg and *Anastaplo* are anomalies when compared with preceding as well as succeeding decisions on freedom of association. Although citing both *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), and *Bates v. Little Rock,* 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960), although recognizing it was in the compulsory disclosure area, and although "weighing . . . the respective interests involved," this Court in *Konigsberg* departed from these cited decisions and employed a considerably less stringent formula in measuring

the state interest necessary to outweigh that of the individual. *Konigsberg v. State Bar,* 366 U.S. 36, 51, 52, 81 S. Ct. 997, 1007, 1007-08, 6 L. Ed. 2d 105 (1961). Instead of demanding that the state come forward with a "controlling justification" for compulsory disclosure as in *N.A.A.C.P. v. Alabama, supra* 357 U.S. at 466, 78 S. Ct. at 1174, and *Bates v. Little Rock, supra* 361 U.S. at 527, 80 S. Ct. at 419, this Court in *Konigsberg* ruled for the state whose interest simply outweighed that of the individual. The closest the Court in *Konigsberg* came to following its own formula was to note that the state's interest was ". . . clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." 366 U.S. at 52, 81 S. Ct. at 1008. But "clearly sufficient" appears to be a far cry from "controlling justification."

Konigsberg and *Anastaplo* appear even more anomalous in light of the later cases, which have accorded the First Amendment right of association significantly greater degrees of protection. For example, the "balancing" test used in *Konigsberg* and *Anastaplo* has changed markedly. Instead of a "controlling justification," as required in both *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 1488 (1958), and *Bates v. Little Rock,* 361 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960), the state must now show an "overriding and compelling state interest" before encroachment upon freedom of association is permitted. *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963); *see also Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 11, 21 L. Ed. 2d 24 (1968).

The doctrine of "overbreadth" has been used to expand freedom of association. *E.g., Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *United States v. Robel,* 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967); *Keyishian v. Bd. of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Cases decided under the principle of "vagueness"

similarly reflect this expansion of First Amendment rights. *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Whitehill v. Elkins,* 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 288 (1967). This Court has also applied the Bill of Attainder clause to accord association greater protection in *United States v. Brown,* 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), and it has strictly construed congressional grants of power to the same effect. *Schneider v. Smith* 390 U.S. 17, 88 S. Ct. 682, 19 L. Ed. 2d 799 (1968) (where a seaman was granted the right to resist interrogatories similar to question 27 and still remain eligible for an upgraded maritime position).

In short, *Konigsberg* and *Anastaplo* cases warrant review, clarification, delimiting, and perhaps even overruling in light of the trend since 1961. But they are in any case distinguishable here.

D. *Question 27 Interferes with Freedom of Association Because it Probes Into Protected as Well as Unprotected Areas of Association.*

1. *The violation of the overbreadth principle.*

Question 27 asks whether an applicant is now or has ever been ". . . a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." Membership alone is the immediate subject of question 27 and this is not a crime. *See* 18 U.S.C. § 2385 (Supp. 1969) (the Smith Act); *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 82 (1961); *Noto v. United States,* 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).

Lacking any reference to specific intent or active membership, question 27 violates the principle of *Elfbrandt v. Russell,* 384 U.S. 11, 13, 86 S. Ct. 1238, 1239, 16 L. Ed. 2d 321 (1966), which involved a loyalty oath required of teachers and a statutory gloss

> ". . . subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who 'knowingly and wilfully becomes or remains a member of the

> communist party of the United States or its successors or any of its subordinate organizations' or 'any other organization' having for 'one of its purposes' the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose." (Quoting from the statute).

The oath and the gloss were held to threaten "the cherished freedom of association protected by the First Amendment," *id.* at 18, 86 S. Ct. at 1241, because they applied to "membership without the 'specific intent' to further the illegal aims of the organization. . . ." *Id.* at 19, 86 S. Ct. at 1242.

This Court concluded that "[t]hose who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id.* at 17, 86 S. Ct. at 1241.[11] In terms of methodology, the decision drew heavily upon *Scales v. United States, supra,* and *Noto v. United States, supra,* noted the necessity of an individual's being an "active" member with "specific intent," and recognized "protected freedoms" which apparently lie outside the zone of criminal membership prohibited by the Smith Act. *Elfbrandt v. Russell, supra* 384 U.S. at 15, 19, 86 S. Ct. at 1240, 1242.

The point seems to be that a state cannot penalize association unless that association was actually "criminal" under the Smith Act. Apparently, all of the elements of a Smith Act membership clause offense must be present before any other criminal sanction may be involved. A similar point was made in *United*

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[11] Perhaps as a justification for its preoccupation with beliefs and views, the Committee states that "[t]he basic reasoning behind the Committee's action in this matter is that of meeting the test proposed by Justice Douglas in *Elfbrandt v. Russell. . . .*" Committee Memorandum at 6. However, while recognizing the existence of *Elfbrandt* and its requirement of specific intent and active membership, the Committee promises to reject an applicant for much less than specific intent and active membership. The Committee promises rejection based simply upon a "yes" answer to question 27 and a sincere belief in the overthrow of the government without regard to time, place, circumstance, or specific intent.

States v. Robel, 389 U.S. 258, 262, 88 S. Ct. 419, 423, 19 L. Ed. 2d 508 (1967) (". . . that statute [which] sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, runs afoul of the First Amendment."). *See also Aptheker v. Secretary of State,* 378 U.S. 500, 510, 84 S. Ct. 1659, 1666, 12 L. Ed. 2d 992 (1964).

The basic *Elfbrandt* principle has now been extended from the area of governmental regulation and prosecution to those situations involving inquiries and disclaimers. Several cases have held that inquiries and disclaimers, which pertain to an individual's assocations, cannot be allowed unless they are narrowly framed to relate only to memberships accompanied by specific intent.[12] *See Gilmore v. James,* 274 F. Supp. 75, 92 (N.D. Tex. 1967); *Reed v. Gardner,* 261 F. Supp. 87 (C.D. Cal. 1966); *Law Students' Civil Rights Research Council v. Wadmond,* 37 U.S.L.W. 1135, 2490, 2491 (S.D.N.Y. 1969).

On the basis of these cases, question 27 would be unconstitutional because it clearly probes into memberships which could be innocent under the Smith Act. A bar applicant must respond to question 27 even though he had no specific intent and he was not an active member.

2. *The overbreadth principle of Elfbrandt should not be applied to question 27.*

The overbreadth principle should not be made the ground for a decision in this case. From the bar applicant's standpoint, narrowly drawn questions, including all of the elements of a Smith Act membership clause conviction, are also unsatisfactory for two broad reasons. First, such a question would not lighten the applicant's burden in making the difficult judgments about the

[12] This may be due in part to *Wieman v. Updegraff,* 344 U.S. 183, 191, 73 S. Ct. 215, 219, 97 L. Ed. 216 (1952), which, on due process grounds, struck down a disclaimer for not distinguishing between knowing and unknowing membership: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

applicability of the subtle standards of the Smith Act. The perjury charge would still exist for a miscalculation and there would still be a definite deterrent impact upon freedom of association.

Secondly, the Fifth Amendment problems would only be intensified: if the inquiry contained all of the Smith Act elements, then a "yes" answer would provide all the proof needed for conviction. In short, the question would give the individual the burden of proving guilt or innocence. Such a situation was condemned in *Speiser v. Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958): "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case *that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.*" (emphasis supplied).

IV. *The Arizona Supreme Court Decision Violates Due Process.*

A. *Due Process Requires That Any Qualification For The Practice of Law Must Have A Rational Connection With The Applicant's Fitness or Capacity to Practice Law.*

Given the rule that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," this Court has held that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957); *accord, Application of Levine,* 97 Ariz. 88, 91, 397 P.2d 205, 206-07 (1964). In a practical sense, this rule is attributable to the importance of one's right to an occupation in general, *Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959) (". . . the right . . . to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."), and one's right to

practice law in particular. *Ex parte Garland,* 4 Wall. 333, 379, 18 L. Ed. 336 (1867); *Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967) (". . . the practice of law is not a privilege but a right. . . .").

The standards for practicing law in Arizona are general and vague. The only possible criterion relevant to this case and contained in Arizona Supreme Court Rule 28(c)(IV)(4) is the requirement that the applicant be "of good moral character." *See Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967) (". . . the practice of law is . . . conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications.").

Neither question 27 nor any answer to it has any legitimate bearing on petitioner's moral character or on her fitness and capacity to practice law. Good moral character and commitment to the Constitution are clearly evident in this case. Petitioner has complied with the mandate of *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and has cooperated with the Committee by listing every organization to which she has belonged since age 16.

In Arizona, "[u]pon admission to the state bar, the applicant . . . shall, in open court, take and subscribe an oath to support the constitution of the United States and the laws of the state of Arizona. . . ." ARIZ. REV. STAT. ANN. § 32-213(B). To answer question 27, which poses serious constitutional issues, would be inconsistent with the obligation to "support the Constitution of the United States." Petitioner could not, in good conscience, swear to "support the Constitution of the United States" and at the same time comply with an unconstitutional intrusion into her rights and into the rights of other applicants.

B. *Exclusions From the Bar For Smith Act Membership Clause Violations Should Occur Only After a Federal Court Has Rendered a Conviction.*

Question 27 asks for membership in organizations which advocate the "overthrow of the *United States Government* by force

or violence." (emphasis supplied). Restricted to the United States Government, question 27 was undoubtedly posed to ascertain whether the bar applicant has violated the membership clause of the Smith Act, 18 U.S.C. § 2385 (Supp. 1969).[13]

Nothing short of an actual violation of the Smith Act could possibly support the inference of bad moral character and an ensuing exclusion. Membership alone is insufficient. *Cf. Schware v. Board of Bar Examiners,* 353 U.S. 232, 246, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796 (1957) (". . . membership in the Communist Party does not justify an inference that he [*i.e.,* a bar applicant] presently has bad moral character."). After all, membership alone is not a crime. *See Scales v. United States,* 367 U.S. 203, 222, 81 S. Ct. 1469, 1482-83, 6 L. Ed. 2d 82 (1961).

An actual violation of the Smith Act membership clause should be determined by a federal court rather than by a bar committee. Since the Committee would have to find a violation before exclusion is permitted, since the exclusion from the practice of law is "punishment," *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), and since the exclusion of lawyers from practice is the exercise of "judicial power," *id.* at 379, only a federal court is properly constituted to decide issues of guilt and punishment under federal law.

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[13] The question also asked for membership in the Communist Party. However, this membership, if it existed, already would have been given in response to question 25 which called for "all" memberships. There is no claim that any of petitioner's groups, listed in response to question 25, is the Communist Party. As the Committee states,

"Since Petitioner admits to a full answer to Question 25, i.e., a full listing of all organizations with which Petitioner has been associated since age 16, *we may lay aside any consideration of the requirement of Rule* [*sic*] *27 that Petitioner tell the Committee whether or not she has ever been a member of the Communist Party.*" Opposition Brief to Petition for Certiorari at 3 (emphasis supplied).

By the Committee's own statement, question 27 has no connection with the Arizona Sedition statute, ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969), which makes it a crime to become ". . . a member of the Communist Party . . . [with] knowledge of said unlawful purpose of said Communist Party. . . ." Hence, the criminal statute to which question 27 pertains, in this case, is the federal Smith Act.

As a matter of jurisdiction, the states and their bar committees have no authority to apply federal criminal statutes particularly when the offense consists of sedition against the United States. Under 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction, *exclusive of the courts of the States,* of all offenses against the laws of the United States." (emphasis supplied). This Court has withdrawn from the states, under *Pennsylvania v. Nelson,* 350 U.S. 497, 504, 76 S. Ct. 477, 481, 100 L. Ed. 640 (1956), all power to prosecute for sedition against the United States since "Congress has intended to occupy the field of sedition." The same policy considerations of uniformity in *Nelson* are applicable where 50 different bar committees might well be applying federal sedition law.

As a practical matter, the elements of the Smith Act membership clause are too difficult to place in the hands of bar committees for application. Such a conviction requires active membership, specific intent, an organization engaged in illegal advocacy and knowledge of the organization's purpose. *Scales v. United States,* 367 U.S. 203, 222, 229, 81 S. Ct. 1469, 1482, 1486, 6 L. Ed. 2d 82 (1961); 18 U.S.C. § 2385 (Supp. 1969). These elements are subtle and "call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy." *Scales v. United States, supra* 367 U.S. at 232, 81 S. Ct. at 1487-88. As illustrative of why state bar committees should not apply these standards, the Committee in the present case promises to reject on the basis of membership and sincere belief — a far cry from *Scales.*

Seeking out bad moral character because of political affiliation is quite different from basing such a conclusion on burglary, murder, sabotage, and acts which are per se clearly indicative of corruption and lack of integrity. Even the violation of some laws, where political principle has been involved, is not bad moral character. According to *Hallinan v. Committee of Bar Examiners,* 55 Cal. Rptr. 228, 239, 421 P.2d 76, 87 (1966):

"To the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished. *But criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders.* The purposes of investigation by the bar into an applicant's moral character should be limited to assurance that, if admitted, he will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court." (emphasis supplied).

This Court has taken a similar view. With respect to the charge that the applicant had violated the Neutrality Act during the Spanish Civil War, this Court in *Schware v. Board of Bar Examiners,* 353 U.S. 232, 242, 77 S. Ct. 752, 758, 1 L. Ed. 2d 796 (1957), said that "[f]rom the facts in the record it is not clear that he was guilty of its violation. *But even if it be assumed that the law was violated, it does not seem that such an offense indicated moral turpitude* — even in 1940. Many persons in this country actively supported the Spanish Loyalist Government." (emphasis supplied). The point was: "In determining whether a person's character is good the nature of the offense which he has committed must be taken into account." *Id.* at 243, 77 S. Ct. at 758.

Federal courts, not state bar committees, should make ultimate decisions of guilt and punishment in this politically sensitive and difficult area, which is exclusively reserved to the federal government. Only after a conviction in federal court could there ever be a rational basis for invoking the severe penalty of exclusion from the bar. Thus, in this case, question 27 can serve no legitimate purpose and a refusal to answer cannot be a rational basis for exclusion.

C. *To Demand That Lawyers Conform to the Political Orthodoxies of the Day is Counterproductive: the Result is a Bar Which Often Abdicates its Duty to Defend Unpopular Causes.*

Questions probing into the beliefs of bar applicants are not necessary to prevent unethical people from practicing law. In-

quiries into the character of applicants can be made of references during the investigation by the bar committee. In every state a prospective lawyer, upon entering the bar, must take an oath of office. In addition, each lawyer is required to maintain certain standards of conduct at the price of possible disbarment. 1 EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 262 (3d ed. 1967); *see* ARIZ. REV. STAT. ANN. § 32-267 and ARIZ. S. CT. R. 29 (b) (Arizona grounds for disbarment). Beyond these checks, the procedures of criminal law are available to punish unlawful behavior of a lawyer: "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy,* 37 A.B.A.J. 123 (1951).

Question 27 does nothing to accomplish the objective of screening unethical lawyers. It acts as an impediment to the unorthodox applicant and to the applicant who believes that the question violates the Bill of Rights. As a result, the public suffers. Lawyers have a duty to serve the entirety of the public regardless of its individual political views and activities. The profession may be unable to fulfill this duty if the establishment is entitled to weed out of the bar those who, by virtue of their own outlooks, may view with sympathy the legal problems of the anti-establishment minorities.

Lawyers' oaths of a political sort, in addition to restricting the membership in the bar, make less available the services of counsel. As said in a joint statement by 24 lawyers, including former Attorney General Herbert Brownell, Jr., "The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. . . . A lawyer might hesitate to represent accused Communists lest it be said that such representation constituted support of an organization of the prohibited kind." *The Proposed Anti-Communist Oath: Op-*

position Expressed to Association's Policy, 37 A.B.A.J. 123, 125 (1951).

A lawyer must be free to take a case regardless of the politics of his client. As Thomas Erskine said in 1792, "[f]rom the moment that any advocate can be permitted to say that he *will,* or will *not,* stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." J. CLARK, GREAT SAYINGS BY GREAT LAWYERS 266 (1926).

American legal tradition is resplendent with examples of lawyers who have defended unpopular causes.[14] However, all too often the accused have been deprived of right to counsel because of refusal of lawyers to represent discredited people or unpopular causes. A.B.A. COMM. ON THE BILL OF RIGHTS, 86 A. B.A. REP. 474, 476 (1961). And lawyers who have defended unpopular clients have suffered many types of retribution.[15]

A consequence of attempts at punishment and intimidation is that the right to counsel often is nonexistent. In the words of Mr. Justice Douglas,

> "[f]ear even strikes at lawyers and the bar. Those accused of illegal Communist activity — all presumed innocent, of course, until found guilty — have difficulty getting reputable lawyers

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[14] Andrew Hamilton defended the printer John Peter Zenger who was charged with the crime of publishing criticism of the British Majesty, 1 LEWIS, GREAT AMERICAN LAWYERS 31 (1907); Wendell Wilke defended Communist Party member Schneiderman, *Schneiderman v. United States,* 320 U.S. 118, 119, 63 S. Ct. 1333, 1334, 87 L. Ed. 1796 (1943); Charles Evans Hughes stood up for the rights of ten Socialist Assemblymen expelled from the New York Legislature, O'Brien, *Loyalty Tests and Guilt by Association,* 61 HARV. L. REV. 592, 593-94 (1948); John Adams defended an English Captain charged with giving orders to his soldiers to fire on a group of colonists, 1 J. Q. ADAMS & C. F. ADAMS, LIFE OF JOHN ADAMS 145 (1871); and Roger Taney defended a minister charged with inciting slaves to insurrection, 4 LEWIS, GREAT AMERICAN LAWYERS 91 (1908).

[15] *See* Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C.L. REV. 9 (1964), for examples of repercussions including contempt charges, loss of practice and other forms of intimidation, taken against lawyers who defended unpopular causes.

to defend them. . . . Some could not volunteer their services, for if they did they would lose clients and their firms would suffer. Others could not volunteer because if they did they would be dubbed 'subversive' by their community and put in the same category as those they would defend. This is a dark tragedy." Douglas, *The Black Silence of Fear,* N. Y. Times, Jan. 13, 1952 (Magazine) 7, 37-38.

This fear is a real thing, and it has practical consequences. As was said by one Washington, D. C. lawyer concerning his refusal to take so-called loyalty cases or even to refer them to other attorneys: ". . . I couldn't take them. They asked me to recommend other lawyers, but I wouldn't be caught dead sending them on to another lawyer — for fear he would think I think he's a Communist, or something. I know that's bad, but most lawyers feel the same way." Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C.L. REV. 9, 18 (1964) (Quoting from the Washington Daily News, Jan. 14, 1954, at 17, col 2).

In the proposed revision of the Canons of Ethics of the American Bar Association, the Special Committee on Evaluation of Ethical Standards says: "The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and *are able to obtain the services of acceptable legal counsel.*" A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY 11 (Preliminary Draft Jan. 15, 1969) (emphasis supplied). This is indeed an empty platitude if the lawyers who are likely to serve some segments of the community are cut off at the gate. It is vital that these lawyers be permitted to contribute their services, for lawyers perform a very essential function in society. As Mr. Justice Black said:

"Who more nearly appreciates the value of individual freedom than the lawyers of America? . . . Who but lawyers are able to stop at the threshold any of the dangers that come from an invasion of the individual rights upon the theory that this Nation has something to fear by recognizing the

liberty of the individuals? I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak[:] The liberty of the individual to go to the church of his choice, to belong to the party of his choice, to speak his views, however bad we may think they are. No people but the lawyers, and when they fail, the torch of individual liberty will be carried by nobody else." Black, *The Lawyer and Individual Freedom,* 21 TENN. L. REV. 461, 469 (1950).

V. *The Question and the Decision Below Unconstitutionally Invade Petitioner's Freedom From Self-Incrimination.*

A. *The Privilege Against Self-Incrimination Was Claimed.*

Question 27 reads "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?" Petitioner refused to answer this question, in part, because of her privilege against self-incrimination.[16] This Fifth Amendment right was claimed in the petition filed with the Arizona Supreme Court and the Committee's response denied this claim. App. 3, 4.

There are two basic reasons for the claim. First, an applicant's answer to question 27 could be "yes." This response would provide a link in the chain of evidence that could lead to prosecution under either the Smith Act, 18 U.S.C. § 2385 (Supp. 1969), or the Arizona Sedition Act, ARIZ. REV. STAT. ANN. § 13-707(C)

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[16] The fact that First Amendment rights also were claimed is immaterial. As said in *Quinn v. United States,* 349 U.S. 155, 163, 75 S. Ct. 668, 673-74, 99 L. Ed. 964 (1955):

"The Government argues, however, that the references to the Fifth Amendment in the instant case were inadequate to invoke the privilege because Fitzpatrick's statements are more reasonably understood as invoking rights under the First Amendment. We find the Government's argument untenable. The mere fact that Fitzpatrick and petitioner also relied on the First Amendment does not preclude their reliance on the Fifth Amendment as well. If a witness urges two constitutional objections to a committee's line of questioning, he is not bound at his peril to choose between them. By pressing both objections, he does not lose a privilege which would have been valid if he had only relied on one."

(Supp. 1969). *Hoffman v. United States,* 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951); *see Quinn v. United States,* 349 U.S. 155, 162, 75 S. Ct. 668, 673, 99 L. Ed. 964 (1955); *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 82 (1961). Second, given the difficulty of determining whether the applicant's past or present organizations fall within the scope of question 27, the possibility of a perjury charge is a further consideration. *See* ARIZ. REV. STAT. ANN. § 13-561 (Arizona perjury statute); *Cf. Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

B. *Since The Fifth Amendment Protects The Innocent As Well As The Guilty, The Privilege May Be Invoked On The Basis of The Question Alone.*

The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty. *Ullmann v. United States,* 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 (1956); *Slochower v. Board of Higher Educ.,* 350 U.S. 551, 557-58, 76 S. Ct. 637, 641, 100 L. Ed. 692 (1956). Hence, the claim of the privilege does not hinge on the applicant's answer to question 27. The privilege may be asserted if the question posed calls for a *possible* answer which could tend to be incriminating. Question 27 is not a "neutral" question. A "yes" answer would be incriminating.

A question calling for disclosure of mere association with the Communist Party, without more, presents a sufficient threat of prosecution to support the claim of privilege. *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 77, 86 S. Ct. 194, 198, 15 L. Ed. 2d 165 (1965); *Communist Party v. United States,* 331 F.2d 807, 812-13 (D.C. Cir. 1963). It is only necessary for the proper invocation of the privilege against self-incrimination that "a *possible* answer . . . must have some tendency to incriminate the person to whom the question is addressed." *Emspak v. United States,* 349 U.S. 190, 203, 75 S. Ct. 687, 704, 99 L. Ed. 997 (1955) (Mr. Justice Harlan, dissenting) (emphasis supplied).

To sustain the privilege, it need only be evident from the implications of the question and the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Proof of any actual hazard to an individual claimant is not required. *Hoffman v. United States,* 341 U.S. 479, 486-87, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951); *Malloy v. Hogan,* 378 U.S. 1, 11-12, 84 S. Ct. 1489, 1495-96, 12 L. Ed. 2d 653 (1964). The Court expressly noted in *United States v. Covington,* ..... U.S. ....., 89 S. Ct. 1559, 1561 (1969), that "[t]he question whether the defendant faced a substantial risk of incrimination is usually one of law which may be resolved without reference to the circumstances of the alleged offense."

As in *Marchetti v. United States,* 390 U.S. 39, 48, 88 S. Ct. 697, 702-03, 19 L. Ed. 2d 889 (1968); *Grosso v. United States,* 390 U.S. 62, 67, 88 S. Ct. 709, 713, 19 L. Ed. 2d 906 (1968); *Haynes v. United States,* 390 U.S. 85, 97, 88 S. Ct. 722, 730, 19 L. Ed. 2d 923 (1968); and *Leary v. United States,* ..... U.S. ....., 89 S. Ct. 1532, 1539 (1969), the claim of privilege as to question 27 is asserted in "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 79, 86 S. Ct. 194, 199, 15 L. Ed. 2d 165 (1965). Although Congress may find some principles and practices of politics and religion so abhorrent as to warrant criminal liability, "to be placed beyond the pale of the First Amendment is not to be deprived of the Fifth. It is, rather, the very reason for its being." *Communist Party v. United States,* 384 F.2d 957, 968 (D.C. Cir. 1967).

C. *The Privilege Can Be Claimed In A Bar Admission Proceeding.*

The privilege's availability is not limited to the context of criminal trials. In *Application of Gault,* 387 U.S. 1, 49, 87 S. Ct. 1428, 1455, 18 L. Ed. 2d 527 (1967), the Court said that "the

availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." In *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 94, 84 S. Ct. 1594, 1611, 12 L. Ed. 2d 678 (1964), Mr. Justice White, concurring, wrote that "[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. . . ." In short, the claim may be made in the setting of bar admissions. *Cf. Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).

D. *Exclusion From the Bar May Not Be the Consequence of Claiming the Privilege.*

It is clear that the consequence of Sara Baird's invocation of her Fifth Amendment rights has been exclusion from the bar. This result is not permissible.

The Court in *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967), held that a lawyer who claimed the Fifth Amendment privilege could not be disbarred for refusing to honor a subpoena duces tecum and for declining to answer questions posed by a bar committee. The same result should occur in a bar admission case, for disbarment and exclusion are essentially the same. As noted by Mr. Justice Harlan, dissenting in *Spevack,* ". . . I can perceive no distinction between 'admission' and 'disbarment' in the rationale of what is now held." *Id.* at 521, 87 S. Ct. at 631. The difference, if any, between exclusion and disbarment is "not of constitutional moment." *Cohen v. Hurley,* 366 U.S. 117, 123, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1961) (overruled by *Spevack v. Klein, supra*).

The basic principle underlying Spevack is that a person should "suffer no penalty" for his silence, and that "[i]n this context 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of *any sanction* which makes assertion of the

Fifth Amendment privilege 'costly'." *Spevack v. Klein, supra* 385 U.S. at 514-15, 87 S. Ct. at 625 (emphasis supplied). Denial of admission to the bar is just as costly as disbarment and this Court in *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), recognized that exclusion from the practice is indeed "punishment." In both disbarment and exclusion, the "price for asserting" the privilege is "deprivation of a livelihood." *"Spevack v. Klein, supra* 385 U.S. at 514, 87 S. Ct. at 627.

Sara Baird has been "confronted with Hobson's choice." *Gardner v. Broderick,* 392 U.S. 273, 277, 88 S. Ct. 1913, 1916, 20 L.Ed. 2d 1082 (1968). She has been forced to choose between her Fifth Amendment rights and her legal career.

CONCLUSION

It is respectfully submitted that the decision of the Court below should be reversed and that an order should be entered directing that petitioner be made a member of the Arizona State Bar forthwith.

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June, 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1079~~ 15

SARA BAIRD, *Petitioner,*

vs.

STATE BAR OF ARIZONA, *Respondent.*

Brief for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1079

SARA BAIRD, *Petitioner,*

vs.

STATE BAR OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondent

JURISDICTION

A serious question is presented as to whether or not the order of the Arizona Supreme Court as to which certiorari is directed meets the test of finality required by Title 28, Section 1257 U.S.C.

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62
N.A.A.C.P. v. Williams, 359 U.S. 550
Grays Harbor Logging Co. v. Coats Fordney Co., 243 U.S. 251
Bruce v. Tobin, 245 U.S. 18
Mississippi Central Ry. Co. v. Smith, 295 U.S. 718

While not excerpted in Petitioner's Appendix, the Response of the Committee to the Order to Show Cause is before the Court. In its Conclusion the Committee stated to the Court at pages 7 and 8 thereof:

> "The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.
>
> "The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission to practice law under the decisions of the United States Supreme Court which have been reviewed in this Memorandum and also in the Memorandum of counsel for the petitioner."

The Petition addressed to the Arizona Supreme Court by Petitioner prayed alternatively:

> "WHEREFORE, your petitioner prays that this Court make and enter its order requiring the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona to be and appear before this Court at a date and time certain then and there to show cause, if any it may have, why petitioner should not forthwith be recommended for admission to the State Bar, or, in the alternative, to show cause why

petitioner's application should not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit." Baird App. 3

INTRODUCTION

Petitioner has not stated the posture of her application to the Arizona Supreme Court Committee on Examinations and Admissions (hereinafter "Committee") either accurately or fairly. Neither has the action of the Arizona Supreme Court been accurately nor fairly reported.

Petitioner has not been denied admission to practice as an attorney at law in Arizona by the Arizona Supreme Court.

The Committee has not refused to recommend to the Arizona Supreme Court that Sara Baird be either admitted to practice nor denied that privilege.

The Committee has advised Sara Baird that it has not completed its character report and that it cannot do so until she completes her application papers. The Committee, contrary to the repeated assertions and insinuations to the contrary in Petitioner's Brief, has also made it abundantly clear that *regardless of the political beliefs and views of Sara Baird it is only if she is found to actively believe in the notion and espouses an activist role in implementing the notion that our government be destroyed by force and violence* that a favorable recommendation will be refused her by the Committee. And even as to this there is no final action by the Committee.

While the Committee has made plain its views as held by its present members, there is no certainty either that these views will remain unchanged or that the Committee as presently constituted, will not be otherwise constituted when a final decision is made by the Committee. The

Committee serves at the pleasure of the Arizona Supreme Court. Rule 28(a), Rules of Arizona Supreme Court, App. A, post p. 1.

Accordingly, since Petitioner has voluntarily answered question 25 by listing all organizations of which she has been a member since age 16, she has limited her objection to answering question 27 to an objection to stating whether or not she is or has been a member of "any organization that advocates overthrow of the United States Government by force and violence."

QUESTIONS PRESENTED

Petitioner does not present the questions for review accurately or succinctly. As will readily appear from our concise statement of the case and the following argument, in substance three questions are presented. One of miniscule proportions, the other two of some substance.

Question 1. Assuming the validity of Petitioner's argument that she had already answered the question complained of (Petitioner's Brief on the Merits (hereinafter P.B.) 2, 10, 23, 25, 32, 33), does the requirement that she answer an additional question by a simple "yes" or "no" present a constitutional question (if any) of sufficient magnitude to warrant expending the judicial time necessary to elucidate an answer?[1]

Question 2. Is a determination as to whether or not an applicant for admission to practice as a lawyer, actively believes in, advocates and will seek the overthrow of the Government of the United States by force and violence,

1. Petitioner's argument runs—since in answer to question 25 I have already listed *all* organizations to which I have belonged or now belong since age 16, necessarily, in addition to disclosing membership or non-membership, present or past, in the Communist Party, I have also named all other organizations to which I have belonged or now belong and thereby disclosed membership or non-membership in any organization which advocates overthrow of the Government of the United States by force and violence.

a legitimate subject of inquiry by the admitting authority of a state?

Question 3. May an applicant for admission to the practice of law before a State Supreme Court refuse to answer questions legitimately bearing upon the qualifications of such applicant to practice as an attorney upon the ground that to do so may incriminate such applicant?

STATEMENT OF THE CASE

Undoubtedly through failure to re-examine the proceedings below Petitioner has made a material misrepresentation to the Court by asserting as a fact that Petitioner has been "denied admission to the State Bar of Arizona for that reason alone (refusal to answer question 27) by the Supreme Court of Arizona." This is untrue.

The Committee has not refused to recommend to the Arizona Supreme Court that Petitioner be admitted to the practice of law in Arizona nor has the Arizona Supreme Court denied this privilege or right to the Petitioner.

The Committee has in express language advised Petitioner:

(a) if you admit that you are or have been a Communist or have been a member of any similar organization, we will still recommend your admission to practice because we cannot legally do otherwise unless

(b) the Committee finds you presently actively adhere to and expect to support and advance a belief that the Government of the United States should be overthrown by force and violence;

(c) in which event the Committee in its present view of the matter would recommend against your admission to the practice of law.

After so advising the applicant, the Committee, while conditionally admitting the applicant to the examination

and conditionally processing her examination paper, suspended further inquiry as to the character and moral fitness of the applicant to practice law.

Instead of cooperating with the Committee to the end that its obligation to the Arizona Supreme Court of investigating and reporting upon the character and moral fitness of each applicant for admission to the practice of law might be faithfully discharged, Petitioner refused to do so and initiated the proceedings by Petition to the Arizona Supreme Court for an order requiring the Committee to show cause why it should not either forthwith recommend the admission of Petitioner or, alternatively complete the processing of her application without requiring an answer to question 27.

This the Arizona Supreme Court refused to do. The Committee has not and cannot in good conscience certify to the Arizona Supreme Court that Sara Baird has the character and moral fitness to practice law if she does actively support and advocate the overthrow of the Government of the United States by force and violence.

SUMMARY OF ARGUMENT

Since Petitioner listed all organizations of which she was a member, the only issue here is whether or not a state admitting authority can inquire of an applicant for admission to practice law whether or not the applicant believes in and will advance the notion that the Government of the United States should be overthrown by force and violence.

The Arizona Committee affirmatively advised Petitioner that political affiliations, Communist or otherwise, would not disqualify her for a favorable recommendation unless she actively believed in and proposed to advance the overthrow of the United States Government by force and vio-

lence; hence the right of association with and the right to subscribe to unpopular political beliefs is not involved.

The right to take refuge in First and Fifth Amendment rights by an applicant for a certification of fitness to follow and practice a profession such as an attorney at law stands on a different ground from the right of an applicant for a job as a teacher or mail carrier. It also stands upon a different ground from the right of one already certified to practice law to invoke those privileges to defend his established qualifications.

ARGUMENT

Preliminary Statement

Petitioner has ranged far afield from the one issue here involved and in so doing has set up many tottering straw men and then promptly blown them over with great learning and much gusto. Petitioner's Brief is undoubtedly interesting, stimulating and informative and should greatly enhance the reputation of counsel as a learned barrister, but the many pages of discussion of various constitutional holdings of the Court and other precedents shed but a weak and flickering light upon the sole problem in this proceeding—they serve to obscure rather than determine the issues.

This responding Brief will not accept the challenge to debate interesting but unrelated constitutional problems. There are in essence three questions which may be stated. The first may be disposed of somewhat summarily—"a horse quickly curried." The second and third questions, once the underbrush of unrelated argument and citation of authority is cut away may also be disposed of quickly.

Question First

Assuming the validity of Petitioner's argument that she had already answered the question complained of (Peti-

tioner's Brief on the Merits (hereinafter P.B.) 2, 10, 23, 25, 32, 33), does the requirement that she answer an additional question by a simple "yes" or "no" present a constitutional question (if any) of sufficient magnitude to warrant expending the judicial time necessary to elucidate an answer?[1]

If it is true as Petitioner asserts, that by answering question 25 she also answered question 27, then this is indeed a tempest in a teapot—and a small pot at that. This entire proceeding would assume the character of a frivolous controversy and an imposition upon the time of the Court if Petitioner's position be accepted. A refusal under this circumstance to write a further short answer—yes or no—could only be characterized as an exercise in intransigency.

Petitioner is wrong.

The question serves a legitimate and useful purpose. The Committee cannot know nor can it readily ascertain the purposes and intended objectives of every organization which may be listed in answer to question 25. Assume an answer including an organization by name such as "The Sons and Daughters of I Will Arise." This could truly be a Christian group with religious objectives. But also it could be an organization devoted to the objectives of Lenin, Stalin or any other deceased person whose teachings and objectives were not conducive to the continued security and welfare of our government and way of life.

Only the applicant might have firsthand knowledge and

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1. Petitioner's argument runs—since in answer to question 25 I have already listed *all* organizations to which I have belonged or now belong since age 16, necessarily, in addition to disclosing membership or non-membership, present or past, in the Communist Party, I have also named all other organizations to which I have belonged or now belong and thereby disclosed membership or non-membership in any organization which advocates overthrow of the Government of the United States by force and violence.

the ability to inform the Committee as to this reasonably important information. The Committee has neither the time nor the resources to investigate the nature and objective of each organization which an applicant may identify. Accordingly the question is needed and helpful to the Committee.

Question Second

Is a determination as to whether or not an applicant for admission to practice as a lawyer, actively believes in, advocates and will seek the overthrow of the Government of the United States by force and violence, a legitimate subject of inquiry by the admitting authority of a state?

This question presents the real issue in this cause since the claim of self-incrimination which Petitioner now argues strenuously is not in issue unless Petitioner now disavows her verified representation to the Arizona Supreme Court that Petitioner "fully and truthfully answered Question No. 25 of the Questionnaire and Affidavit which question reads as follows:

> 'List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.'" Baird App. 2, 3;

and her representation to this Court to the same effect. Opening Brief 6, 9, 10, 25, 33.

A fair reading of the position of the Committee presents then the one real question here in issue, which is—should one who believes that the Government of the United States should be destroyed by force and violence and who in fact is willing to actively participate in such activity be extended the privileges, responsibilities and powers of an attorney at law?

Stated otherwise, should one who entertains the view that a lawyer should seek and support the violent over-

throw of the Government of the United States by force and violence be admitted to the practice of law so that he may implement these views through use of his powers and privileges as an attorney at law?

Such is a fair reading of the position of the Committee objectively examined apart from scattered excerpts therefrom. Baird App. 5, 6.

There is a distinction—and a legitimate distinction—between what may be required of one who seeks certification from an officer, agency or other body that such applicant has the ability, character and fitness necessary to serve the state, nation or public in a capacity which requires public responsibility as well as ability and integrity and what may be a sufficient showing to warrant taking away a vested right to discharge such functions.

In the first case the applicant has not demonstrated the requisite character and ability to function in an area of public responsibility and is seeking to establish to the required satisfaction of those having the responsibility for certifying to the public that the applicant may be safely turned to for help.

But in the second case the person involved in the inquiry has demonstrated the required ability, integrity and sense of responsibility and thus may rest upon the record since he or she is not petitioning anyone for a certification that the required ability, integrity and sense of responsibility are attributes of the individual involved. Cf. *Orloff v. Willoughby,* 345 U.S. 83.

Thus *Spevack v. Klein,* 385 U.S. 511, is not controlling. Here there is no threat of disbarment and loss of professional reputation and standing. True, continued refusal on the part of Petitioner to permit the Committee to complete its investigation will, as long as continued, bar Petitioner from pursuing her livelihood in the practice of law, but

this is a quite different situation from that faced by the Petitioner in *Spevack*.

Further, the case does not involve either the disbarment or the admission to practice of a lawyer or a would-be lawyer—it involves the right of a State Supreme Court to require that its Committee satisfy itself that, among other things, those admitted to practice law will not foment rebellion, riot and great public discord. Only that and nothing more.

In commenting upon the responsibility, and accordingly the broad discretion, State Supreme Courts have in prescribing standards for admission to practice, Judge Stanley Barnes, speaking for the Court said in *Hackin v. Lockwood*, 361 F.2d 499 (C.A. 9, 1966):

> "Just as the Supreme Court in *Schware*, infra, refused (353 U.S. at 239 n. 5, 77 S.Ct. at 756) to go into any discussion whether the practice of the law is a 'right' or a 'privilege,' we need not do so. In either event, any restriction on such practice must be valid, i.e., reasonable. (Compare Lathrop v. Donohue, 367 U.S. 820, 844, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).)
>
> "We agree with appellant that for the requirement to be reasonable it must not be arbitrary; the reason for the prevention of practice must be valid. Power Manufacturing Co. v. Saunders, 274 U.S. 490, 493, 47 S.Ct. 678, 71 L.Ed. 1165 (1927).
>
> "'A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.' Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed2d 796 (1957).
>
> "Any classification can, in a sense be claimed arbitrary. Is it arbitrary or unreasonable for Arizona to require that an extraordinarily bright legal student, twenty years of age, who has graduated from an ac-

credited law school, wait until he is twenty-one before he can take the examination? We think not. Knowledge may be acquired early by a bright and assiduous student, but the odds are that his judgment will not be so soon acquired. It would be entirely possible, of course, were we to envision a twenty year old law school graduate, that his judgment would be as good or better than one who graduates at twenty-five, but it is probable that it would not.

> "'To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts [in prescribing rules of admission]. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.' Mr. Justice Frankfurter, concurring, in Schware v. Board of Bar Examiners, 353 U.S. at 249, 77 S.Ct. at 761." 361 F.2d at 502, 503

District Judge Wollenberg in *Soltar v. Postmaster General of the United States,* 277 F.Supp. 579 (U.S.D.C. N.D. Cal., 1967) recognized that the requirements of an applicant as a postal clerk were quite different from the requirements of an applicant for the high privilege of practicing law as an officer of the Court. Judge Wollenberg quoted from *Konigsberg v. State Bar of California,* 366 U.S. 36 as follows:

> "It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions." 277 F.Supp. at 580

Judge Wollenberg then went on to say:

"Hence First Amendment rights were 'outweighed by

the State's interest in ascertaining the *fitness of the employee for the post he holds.*' 366 U.S. at 52, 81 S.Ct. at 1008. (emphasis Judge Wollenberg's) In the present case, plaintiff seeks employment as a postal clerk. The Government has not brought forth any significant federal interest which would necessitate the inquiry at hand. Indeed, the Government probably has no interest which would suffice to override the First Amendment rights here at issue. As aptly stated by Justice Douglas in Elfbrandt, supra, 384 U.S. at 17, 86 S.Ct. at 1241:

> "'Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as *public employees.*'" (emphasis Judge Wollenberg's) 277 F.Supp. at 580

The issue is simple. "Is one who believes in and who is willing to work to undermine and destroy the Government of the United States qualified to be admitted to the practice of law?"

We find it hard to believe that the affirmative of this question would ever be seriously asserted.

We do not propose to discuss the loyalty oath cases or the cases dealing with the questions of "guilt by association" or the right to hold political beliefs which are unpopular.

These cases lead us far afield.

First, the loyalty oath cases do not stand for the principle that it is not material to a person's employment whether or not such person would seek to destroy or be in sympathy with an effort to destroy the United States Government. They stand against the notion that membership in or association with organizations hostile to the integrity of our government, without active espousal of the tenets of such organization, is ~~in~~sufficient to bar one from public employment. That, and for the requirement that vague and overly

broad language may not be employed in spelling out the requirements of such statutes.

Here there is no such niceness required. The applicant may answer simply "I don't know what the organization in question advocates" if such be the fact. The argument that Sara Baird, under penalty of perjury, must research the aims and purposes of each organization to which she may have belonged is sheer nonsense. If she knows she says so—if she doesn't she simply states her memberhip and reports her inability to further answer the question.

Secondly, the "guilt by association" cases are wholly inapplicable, for the Committee has advised Mrs. Baird and reported to the Arizona Supreme Court

> "Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission * * " (Response of Committee to Order to Show Cause)

Accordingly the decisions which condemn sanctions because of mere membership in an organization are not in point.

Lastly, the "political belief" cases are disregarded. Activity of a violent character aimed at revolution, public disorder and murder of public figures and destruction of public institutions is no more activity of a political nature than is looting, stealing and burning in connection with anti-segregation or similar demonstrations. Nor is the belief that such violent overthrow of our government is a desirable end to achieve a political belief.

We simply refuse to dignify such arguments by treating them seriously.

Question Third

May an applicant for admission to the practice of law before a State Supreme Court refuse to answer questions legitimately bearing upon the qualifications of such applicant to practice as an attorney upon the ground that to do so may incriminate such applicant?

Sara Baird did not refuse to answer question 27 upon any constitutional grounds in her execution of her affidavit and questionnaire. Her reason was that the question was "not applicable." (Baird App. 2) She did ~~not~~ assert a self-incrimination claim in her Petition to the Arizona Supreme Court.

The only time this Court has spoken, insofar as we are advised, as to the limitations upon the right of an applicant to invoke the Fifth Amendment privilege against self-incrimination is in *Orloff v. Willoughby, supra.* The case is not entirely in point. Neither is *Spevack v. Klein, supra.*

We realize that merely because required observance of a constitutional privilege may be burdensome or expensive does not justify refusing to respect that right or privilege. We approach a consideration of the problem with that principle in mind.

It is said, loosely, that entry upon the practice of the law is a "right." *Application of Klahr,* 102 Ariz. 529, 433 P.2d 977.

Manifestly this is only a broad generalization. The right may be circumscribed with precautions designed for the protection of the public. *Hackin v. Lockwood, supra.*

A more accurate statement would be that one qualified by character, integrity and learning has the right to practice law. The right is not then an absolute right—it is a right subject to a condition precedent, *a condition precedent which the applicant must satisfy.*

If the "right" to practice law were on the same plane as the "right" to become a farmer, then indeed there might

be some reasonable basis for asserting that inquiry as to character and integrity should be foreclosed upon First and Fifth Amendment grounds. But the law reposes no special confidences and privileges in the farmer nor does his lack of integrity or character expose the public to hazard. Neither does his occupation of itself (in most jurisdictions at least) qualify him for judicial office, by appointment or election, or otherwise make available to him opportunities to work harm to the body politic.

Therefore the states are justified in saying to the applicant to enter upon the practice of the law—demonstrate your fitness for this profession. Show that your character, integrity and education are such that our Supreme Court can certify, by authorizing you to practice law, that the public can safely trust their property, their liberty and indeed their lives to your ministrations, guidance and management.

There is then a valid basis for the different results reached in *Orloff* and *Spevack*. In one the Fifth Amendment was invoked to bar an inquiry as to whether or not the applicant had the qualifications required for admission to the Medical Corps; in the other, Spevack, who had theretofore demonstrated that he was qualified to practice law, resisted an encroachment upon this established right through an attempt to violate his right of privacy and his privilege against self-incrimination.

We believe the distinction is valid.

It does not seem reasonable that a Bar Examination Committee, in considering the qualifications of an applicant to practice law in response to their obligation to certify only those affirmatively found qualified by training and character, should be frustrated by the applicant invoking First or Fifth Amendment privileges.

In one voice the applicant says "Admit me, I am honest, my character is good and I am qualified to be authorized to practice law," but immediately after making this representation to the Committee he frustrates the Committee's efforts to confirm that his representations are true by, in response to questions designed to assure the Committee that his representations are true, refusing to answer upon the ground that thereby some criminal activity may be exposed.

Illustratively, suppose an Arizona Committee has reliable information that an applicant for certification by it as to his honesty and integrity had been discharged for embezzlement from a New York City financial institution. If the New York City financial institution, while confidentially confirming that such is the case, refuses "to become involved" and the applicant takes the Fifth Amendment, must the Committee then certify to the Arizona Supreme Court that the applicant has the honesty and integrity to justify admission to practice?

CONCLUSION

The Arizona Supreme Court Committee on Examinations and Admissions should be permitted to complete its processing of the Baird file. The refusal of the Arizona Supreme Court to interfere with legitimate inquiry by the Committee should be affirmed.

Respectfully submitted,

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August 1969

(Appendix Follows)

Appendix A

RULES OF THE SUPREME COURT

V. Admission and Discipline of Attorneys

Rule 28. Examination and Admission

Rule 28(a) Committee on examinations and admissions; powers and duties. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made. The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter may be adopted. The court will then consider the recommendations and either grant or deny admission. As amended effective June 19, 1964.

No. 15

Supp. record filed.
(not printed)
(filed Dec 15, 1969)

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1970

Sara Baird, Petitioner, v. State Bar of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[February 23, 1971]

Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall join.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State Bar*, 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph

[1] The other is No. 18, *In the Matter of the Application of Martin Stolar*. See also No. 49, *Law Students Civil Rights Research Council Inc.* v. *Wadmon*.

Schware was denied admission in New Mexico and this Court reversed, with five Justices agreeing on one opinion, three Justices on another opinion, and one not participating. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957). In another case an applicant named George Anastaplo was denied admission in Illinois on grounds similar to those involved in *Konigsberg* and *Schware*, and the denial was affirmed by a 5-to-4 margin. *In re Anastaplo*, 366 U. S. 82 (1961). See also *In re Summers*, 325 U. S. 561 (1945). With sharp divisions in this Court, our docket and those of the Courts of Appeals have been filled for years with litigation involving inquisitions about beliefs and associations and refusals to let people practice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas.[2] Usually these denials of employment have not been based on any overt acts of misconduct or lawlessness, and the litigation has continued to raise serious questions of alleged violations of the First Amendment and other guarantees of the Bill of Rights.[3]

The foregoing cases and others contain thousands of pages of confusing formulas, refined reasonings, and puzzling holdings that touch on the same suspicions and fears about citizenship and loyalties. However we have

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[2] See, *e. g.*, *Adler* v. *Board of Education*, 342 U. S. 485 (1952); *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *United States* v. *Robel*, 389 U. S. 258 (1967).

[3] See the cases cited in n. 2, *supra*. See also *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445 (1950) (BLACK, J., dissenting); cf. *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Wilkinson* v. *United States*, 365 U. S. 399 (1961); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969).

concluded the best way to handle this case is to narrate its simple facts and then relate them to the 45 words that make up the First Amendment.

These are the facts.

The petitioner, Sara Baird, graduated from law school at Stanford University in California in 1967. So far as the record shows there is not now and never has been a single mark against her moral character. She has taken the examination prescribed by Arizona, and the answer of the State admits that she satisfactorily passed it. Among the questions she answered was No. 25, which called on her to reveal all organizations with which she had been associated since she reached 16 years of age.[4] This question she answered to the satisfaction of the Arizona Bar Committee. Consequently there is no charge or intimation that Mrs. Baird has not listed the organizations to which she has belonged since becoming 16. In addition, however, she was asked to state whether she had ever been a member of the Communist Party or any organization "that advocates overthrow of the United States Government by force or violence."[5] When she refused to answer this question, the Committee declined to process her application further or recommend her admission to the bar.[6] The Arizona Supreme Court then denied her petition for an order to the Committee to show cause why she should not be admitted to practice law. We granted certiorari. 394 U. S. 957.

In Arizona it is perjury to answer the bar committee's questions falsely, and perjury is punishable as a felony.

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[4] Brief for Petitioner, App., at 18.

[5] Question No. 27, Application for Admission. Brief for Petitioner, App., at 18.

[6] Response of the Committee on Examinations and Admissions to Order to Show Cause. Brief for Petitioner, App., at 4.

Ariz. Rev. Stat. 13–561 (1956). In effect this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged "advocates overthrow of the United States Government by force or violence." There may well be provisions of the Federal Constitution other than the First Amendment that would protect an applicant to a state bar from being subjected to a question potentially so hazardous to her liberty. But whether or not there are other provisions that protect her, we think the First Amendment does so here. That Amendment, made applicable to the States by the Fourteenth, forbids any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." Mr. Justice Roberts, in referring to the First Amendment's guarantee of freedom of religion, said:

> "Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940).

See also *Schneider* v. *Irvington,* 308 U. S. 147, 160–161 (1939); *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943). And we have made it clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins,* 323 U. S. 516, 531 (1945). The protection of the First Amendment also extends to the right of association. As we said in *Schneider* v. *Smith,* 390 U. S. 17, 25:

> "The First Amendment's ban against Congress 'abridging' freedom of speech, the right peaceably

> to assemble and to petition, and the 'associational freedom' . . . that goes with those rights create a reserve where the views of the individual are made inviolate."

See also *Shelton* v. *Tucker*, 364 U. S. 479, 485–487 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958).

The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. *United States* v. *Robel*, 389 U. S. 258, 266 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (1967). Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution. *Shelton* v. *Tucker, supra; Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); Cf. *Speiser* v. *Randall*, 357 U. S. 513 (1958).

When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. *Gibson* v. *Florida Legislative Investigation Committee, supra*, at 546. Of course Arizona has a legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law. But here petitioner has already supplied the committee with extensive personal and professional information to assist its determination. By her answers to questions other than No. 25, and her listing of former employers, law school professors, and other references, she has made available to the committee the information relevant to

her fitness to practice law.[7] And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.

Much has been written about the application of the First Amendment to cases where penalties have been imposed on people because of their beliefs. Some of what has been written is reconcilable with what we have said here and some of it is not. Without detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law. Clearly Arizona has engaged in such questioning here.[8]

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[7] Respondent has argued that even when an applicant has answered question 25, listing the organizations to which she has belonged since the age of 16, question 27 still serves a useful and legitimate function. Respondent urges:

"Assume an answer including an organization by name such as 'The Sons and Daughters of I Will Arise.' This could truly be a Christian group with religious objectives. But it could also be an organization devoted to the objectives of Lenin, Stalin or any other deceased person whose teachings and objectives were not conducive to the continued security and welfare of our government and way of life." Brief for Respondent, at 8.

The organizations petitioner listed in response to question 25 were: Church Choir; Girl Scouts; Girls Athletic Association; Young Republicans; Young Democrats; Stanford Law Association; Law School Civil Rights Research Council. Respondent does not state which of these organizations may threaten the security of the Republic.

[8] The committee urges that it is entitled to demand an answer to question 27 because:

"Unless we are to conclude that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate. The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would

The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. See *Schware* v. *Board of Bar Examiners, supra, and Ex parte Garland,* 4 Wall. 333 (1866). This record is wholly barren of one word, sentence, or paragraph that tends to show this lady is not morally and professionally fit to serve honorably and well as a member of the legal profession. It was error not to process her application and not to admit her to the Arizona Bar. The judgment of the Arizona Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

For opinion of MR. JUSTICE HARLAN dissenting in this case see No. 18.

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lead to an investigation and interrogation *as to whether the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission." (Emphasis added.) Memorandum in Support of Response to Petition for Order to Show Cause, Brief for Petitioner, App., at 5–6.

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1970

Sara Baird, Petitioner, v. State Bar of Arizona. } On Writ of Certiorari to the Supreme Court of Arizona.

[February 23, 1971]

Mr. Justice Stewart, concurring.

The Court has held that under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not as such unconstitutional. *Konigsberg* v. *State Bar*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82.

Question 27, however, goes further and asks applicants whether they have ever belonged to any organization "that advocates overthrow of the United States Government by force or violence." Our decisions have made clear that such inquiry must be confined to knowing membership to satisfy the First and Fourteenth Amendments. See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258, 265–266; *Law Students Civil Rights Research Council* v. *Wadmond*, *post*, at 10–11. It follows from these decisions that mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals. See *Scales* v. *United States*, 367 U. S. 203, 228–230; *Law Students Civil Rights Research Council* v. *Wadmond*, *post*.

There is a further constitutional infirmity in Arizona's question 27. The respondent State Bar is the agency

entrusted with the administration of the standards for admission to practice law in Arizona. And the respondent's explanation of its purpose in asking the question makes clear that the question must be treated as an inquiry into political beliefs. For the respondent explicitly states that it would recommend denial of admission solely because of an applicant's beliefs that the respondent found objectionable. Cf. *Wadmond, post*, at 7–8. Yet the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs. *E. g., West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304. Cf. *Carrington* v. *Rash*, 380 U. S. 89, 94.

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1970

Sara Baird, Petitioner,
v.
State Bar of Arizona.
} On Writ of Certiorari to the Supreme Court of Arizona.

[February 23, 1971]

Mr. Justice Blackmun, with whom The Chief Justice, Mr. Justice Harlan, and Mr. Justice White join, dissenting.

This, for me, is not at all a case involving mere personal beliefs on the part of Sara Baird.

I have necessarily assumed, and I trust not erroneously, that *Konigsberg* v. *State Bar of California*, 366 U. S. 36, and *In re Anastaplo*, 366 U. S. 82, both decided on April 24, 1961, have remained good law despite the Court's then close division (Justice Harlan and Justices Frankfurter, Clark, Whittaker, and Stewart in the majority; Justice Black, Chief Justice Warren, and Justices Douglas and Brennan, dissenting). Neither case has ever been expressly overruled. Neither is now expressly overruled. In each of the cases the Court decided, at the very least, as Mr. Justice Stewart puts it in his separate concurrence here, that "under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not, as such, unconstitutional."

I think the Court really decided more than that. I say this because (a) in *Konigsberg* the applicant had "reiterated unequivocally his disbelief in violent overthrow, and stated that he had never knowingly been a member of any organization which advocated such action," 366 U. S., at 39; (b) the Court stated that it thought it "clear that the Fourteenth Amendment's

protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications," 366 U. S., at 44; that

> "We likewise regard as untenable petitioner's contentions that the questions as to Communist Party membership were made irrelevant either by the fact that bare, innocent membership is not a ground of disqualification or by petitioner's willingness to answer such ultimate questions as whether he himself believed in violent overthrow or knowingly belonged to an organization advocating violent overthrow." 366 U. S., at 46;

and that,

> "It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions . . . . [W]e regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." 366 U. S., at 51–52.

and (c) in *Anastaplo* it was observed,

> "We have also held in *Konigsberg* that the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Com-

> munist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment." (Footnote omitted.) 366 U. S., at 89.

Petitioner Baird, however, attacked the integrity of these cases before the Arizona court and again attacks their integrity here and claims that, although perhaps distinguishable, the cases "warrant . . . delimiting, and perhaps even overruling in light of the trend since 1961." In my view, Mrs. Baird has now had striking success in her overruling endeavor despite the majority's seeming recognition of the two cases and the separate concurrence's definite bow in their direction.

The present case comes here, after argument for the second time, in a stark and clear posture. Mrs. Baird, applicant for admission to the Bar of the State of Arizona, possessor of an academic degree from Colorado College, and possessor of a degree in law from Stanford University, *refuses* to answer, other than to say "Not Applicable," the 27th inquiry of a questionnaire which the Arizona Supreme Court, by rule, has made a part of the application for membership in the State Bar.[1] That question reads:

> "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

The applicant bases this refusal (a) on the fact that in her answer to a preceding inquiry, the 25th, she listed

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[1] See 102 Ariz., pp. XXIV, XXIX, and XXXVII, for the pertinent provisions of Rule 28 (c) in effect at the time Mrs. Baird submitted her application. The rule was amended, effective August 1, 1970, in ways not relevant here. See 106 Ariz. —.

the organizations of which she had been a member since age 16, and (b) on the asserted legal propositions that to compel her to answer is to deny her First Amendment rights of freedom of belief and freedom of association, her Fifth Amendment right not to incriminate herself, and her Fourteenth Amendment right to due process.

In my view, applicant Baird vastly overstates her case. On this record, I would affirm the judgment of the Supreme Court of Arizona in denying Mrs. Baird's petition for admission to practice law in the State's courts.

There are several factors which prompt my conclusion:

1. Mrs. Baird is an intelligent and knowledgeable person. She holds a college degree and a graduate degree, and, as is assumed here, she has demonstrated in the Bar examination an acceptable knowledge and mastery of the law. There is no claim of vagueness or lack of awareness on her part of precisely what Question 27 meant or of what it was intended to probe. The applicant obviously knew the scope of the question and its concern with the Party and with forceful and violent overthrow of the Government.

2. Mrs. Baird's use of the "Not Applicable" response to Question 27 is not fully understandable. Of course, she may have so phrased that answer hurriedly in the passing thought that, with her listing of organizations in response to Question 25, buttressed by the statement, "This list includes all organizations that I can recall at this time," and with those organizations on the list obviously not within the contemplation of Question 27, the latter question was, indeed, "not applicable." After all, she did employ the same "not applicable" answer on the form in no less than 16 other places; most of these, because of their conditional context, could well have been left blank and would have been expected to

be left blank, despite the general instruction that all questions were to be answered.

Nevertheless she did respond to the inquiry in that manner and, as her brief states, she now has "declined to answer" the question. This, then, leaves this litigation in the posture where the response to Question 27 was not inadvertent and was not the product of any misunderstanding or mistake, where an answer is now flatly refused, and where the applicant, perhaps somewhat defiantly, is content to have the record remain as it is and to have her case won or lost on that record. This is reminiscent of the obstructionist tactics condemned in *Konigsberg* and *Anastaplo*.

3. For Mrs. Baird to say that because she had answered Question 25 and had listed her organization memberships since age 16 she need not respond to Question 27 is no answer at all.[2] To answer the one question fully and to refuse to respond to the other embraces an obvious inconsistency of position, for the two questions are related. Furthermore, the questions are not duplicative. By her refusal to answer Question 27, she would place on the Arizona Committee on Examinations and Admissions[3] and on the Supreme Court of Arizona the burden of determining which of the organizations she listed, if any, was an arm of the Communist Party or advocated forceful or violent overthrow of the Government. That, however, is not the task of the Committee or of the Arizona Supreme Court. It is Sara Baird's task. It is a truism, I think, that the Communist endeavor works beneath the surface as well as in the open and that

[2] The majority, of course, obviously would hold that Question 25 also was impermissible. *In re Stolar, infra*, p. —. Mrs. Baird, however, appears to have had no hesitancy in answering that inquiry.

[3] See Arizona Supreme Court Rule 28 (c).

high-sounding names have been the front and the verbal shield for something very different from what the name imports.

4. No one is in a better position to know the aim and purpose and advocacy of an organization than a member. Certainly the Committee and the Arizona Supreme Court, which have other things to do, are not equipped for the task of checking out the identity of every named organization, especially one which might follow the standard of the less said and known, the better. And Mrs. Baird would place this burden on the Committee by submitting partial answers. She gives the appearance of playing a game. The importance of the subject deserves better than that.

5. It has been said that the burden is on the applicant. *In re Courtney*, 83 Ariz. 231, 233, 319 P. 2d 991, 993 (1957). But a most minimal burden it is. Had she answered "None" to Question 27, that would have been the end of the matter in the absence of obvious prevarication. If she were in doubt, the answer "None to my knowledge" would have accomplished the same result. She chose neither answer. She chose, instead, to remain silent and less than candid.

6. The majority, I feel, fail to place the issue in exact focus. This is not a situation where, as the majority state, and even would do so in a perjury context, "In effect this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged 'advocates overthrow of the United States Government by force or violence.'" It falls far short of guesswork. Mrs. Baird either knew the answer or she did not know it. If she knew, she coupled her knowledge with a attempt to conceal. If she did not know, she had only to state her lack of knowledge. This was no "guess" and, absent the intent to deceive, it certainly was no guess fraught with the risks of perjury.

7. Although Question 27, concededly, would have been better phrased had it gone on to inquire as to the applicant's own knowing participation in, and promotion of, illegal goals, a realistic reading of the question discloses that it is directed not at mere belief but at advocacy and at the call to violent action and force in pursuit of that advocacy. Contrary to the majority's conclusion and to that of the separate concurrence, I find nothing in this record that indicates that Mrs. Baird automatically would have been denied admission to the Bar had she answered Question 27 in the affirmative. The record, and the Committee's brief here,[4] disclose exactly the

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[4] "The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recomend her for admission to practice law under the decisions of the United States Supreme Court . . . ." Brief p. 2.

". . . The Committee, contrary to the repeated assertions and insinuations to the contrary in Petitioner's Brief, has also made it abundantly clear that *regardless of the political beliefs and views of Sara Baird it is only if she is found to actively believe in the notion and espouses an activist role in implementing the notion that our government be destroyed by force and violence* that a favorable recommendation will be refused her by the Committee. . . ." Brief p. 3.

". . . The Committee has not and cannot in good conscience certify to the Arizona Supreme Court that Sara Baird has the character

opposite. In its Memorandum, filed with the Arizona court in support of its response to the order to show cause, the Committee stated that no judgment as to recommendation or nonrecommendation for admission had been made; that an affirmative answer to Question 27 would lead to further inquiry as to Mrs. Baird's expectation actively to support the objective of violent overthrow; and that, if her membership is of a nominal character and she does not participate in the advocacy views, there would be no legal basis for refusing a recommendation for admission.[5] The material quoted in the Court's footnote 8 is from the body of the Memorandum; my reading of that material, however, indicates only that further inquiry is then in order. I do not share the majority's interpretation of that material as being di-

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and moral fitness to practice law if she does actively support and advocate the overthrow of the Government of the United States by force and violence." Brief p. 6.

"The issue is simple. 'Is one who believes in and who is willing to work to undermine and destroy the Government of the United States qualified to be admitted to the practice of law.'" Brief p. 13.

[5] The Memorandum states as its conclusion:

"The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.

"The Comittee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission to practice law . . . ."

rected to mere belief. The key words are whether "violent overthrow . . . is something to be sought after." That is an inquiry into willingness to participate in violence.

8. There is talk, of course, in the briefs here about whether admission to the Bar and receiving authority to practice law is a "right" or a "privilege." I am old enough and old-fashioned enough always to have regarded it more as a privilege than as a right. I at least thought that was the tradition. A century ago Mr. Justice Field referred to the practice of law by a *qualified* person as a right and not as a matter of the State's grace or favor. *Ex parte Garland,* 71 U. S. (4 Wall.) 333, 379 (1866). The Arizona court has spoken in similar terms. *In re Klahr,* 102 Ariz. 529, 531; 433 P. 2d 977, 979 (1967). It could oppositely be stated, with just as much accuracy, as the Bar in its brief here asserts,[6] that "one qualified by character, integrity and learning has the right to practice law." Indeed, this is precisely the way the Arizona court has phrased it: "[T]he practice of law is not a privilege but a right, conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications." *In re Klahr, supra,* 102 Ariz., at 531; 433 P. 2d, at 979. See also *In re Levine,* 97 Ariz. 88, 90–91, 397 P. 2d 205, 206–207 (1964), and *In re Burke,* 87 Ariz. 336, 339, 351 P. 2d 169, 172 (1960).

The characterization of Bar admission as a right or as a privilege may be little more than an exercise in semantics. It seems to me that, whichever it may be, the State, in granting the authority to practice law, with what surely is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood, demands

[6] Page 15.

something more of the applicant than a formal certificate of completion of a course of legal study and the ability acceptably to answer a series of questions on a Bar examination. It presumably demands what fundamentally is character. And it is character which a State holds out to the public when it authorizes an applicant to practice law.

9. Judges and Bar Examiners, of course, should hesitate to judge too strictly those seeking entrance to the profession. Certainly the impatience and far-ranging attitudes of youthful years are not, in themselves, disqualifying. That is part of the maturing process, especially for future lawyers who must study, examine, select and develop their philosophies of life and of their profession. Mr. Justice Frankfurter expressed it well:

> "The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities . . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'
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> . . . . .
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> "History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses and their sense of

responsibility 'questionable characters.'" *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 247, 251 (1957) (concurring opinion).

10. An attorney, we sometimes tend to forget, is an officer of the court. *Ex parte Garland, supra,* 71 U. S. (4 Wall.), at 378. Perhaps we read too much into that phrase. But there is a distinct element of fact and of history in it. We have seen, of late, an overabundance of courtroom spectacle brought about by attorneys—frequently those who, being unlicensed in the particular State, are nevertheless permitted, by the court's indulgence, to appear for clients in a given case—who give indications of ignoring their responsibility to the courts and to the judicial process. Question 27 bears upon this facet of an applicant's character.

11. The Court acknowledges that Arizona has a legitimate interest in determining whether the applicant has the "qualities of character" requisite for the practice of law. But the Court then goes on to prescribe when, in its judgment, the applicant has given a sufficient amount of information to the committee. I doubt if this Court is the proper tribunal to judge the sufficiency of material supplied for legal practice in Arizona. Of course there is a constitutional limit, but that limit is marked by the relevant, by the excesses of unreasonableness and of harassment, and by the otherwise constitutionally forbidden. It should not be marked at an arbitrary point where the applicant, for reasons of convenience or assumed self-protection or contrariness, decides that enough is enough.

12. Finally, the State has a measure of a right to protect itself. Its area of possible vulnerability is nowhere greater than in its courts and in its judicial process. Courtroom events disclosed in recent litigation vividly demonstrate this. See *Illinois* v. *Allen,* 397 U. S. 337 (1970); *Mayberry* v. *Pennsylvania,* — U. S. — (1971).

Assurance that applicant Baird at least professes to refrain from forceful and violent overthrow of the Government of which, upon admission, she will become a true and working part, and under which, for better or for worse, she has lived and, judging by her excellent education, has prospered and enjoyed some benefits, is a subject of legitimate inquiry.

As stated above, on this record I would affirm the judgment of the Supreme Court of Arizona.

SUPREME COURT OF THE UNITED STATES

Nos. 15 & 18.—October Term, 1970

15	Sara Baird, Petitioner, *v.* State Bar of Arizona.	On Writ of Certiorari to the Supreme Court of Arizona.
18	In the Matter of the Application of Martin Robert Stolar.	On Writ of Certiorari to the Supreme Court of Ohio.

[February 23, 1971]

Mr. Justice White, dissenting.

I am quite unable to join the opinions of the Court in these cases. It is my view that the Constitution does not require a State to admit to practice a lawyer who believes in violence and intends to implement that belief in his practice of law and advice to clients. I also believe that the State may ask applicants preliminary questions which will permit further investigation and reasoned, articulated judgment as to whether the applicant will or will not advise lawless conduct as a practicing lawyer.

Arizona has no intention of barring applicants based on belief alone. This my Brother Blackmun makes quite clear. Its inquiries were designed to ascertain whether an applicant expects actively to support illegal violence or espouses an activist role in implementing that idea.

Ohio takes much the same approach, and in my view both States are right. If as a preface to further questions, New York may ask whether an applicant is a knowing member of the Communist Party, although that fact alone would not be grounds for exclusion, see *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*,

post, Arizona and Ohio may ask about simple membership for the same justifiable reason. And if investigation reveals the applicant to be actively furthering the illegal activities of any group or to be without comprehension that advising lawless conduct is incompatible with professional standards, the State should be able to deny admission to the Bar.

As the majority hastens to assure us, a State may assure itself of an applicant's "good character" and educational qualifications. Accordingly, it would be entitled to make an assessment of his "honesty" and refuse to license him if firmly convinced by his responses or other record evidence that he would not conform to the standards of integrity expected of the members of the Bar. Neither should it be required to admit to practice a person who believes in violent conduct to achieve social, political, or other ends and who is currently and actively supporting such activities or who expects to do so in the course of advising clients in his professional role. I thus see no constitutional basis for forbidding the asking of perfectly relevant questions designed to ascertain whether an applicant considers it the proper role of the lawyer, as practitioner, to advise and advocate violence as a means for settling disputes or achieving social or political ends. I therefore dissent from the judgments in both of these cases.